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ST. LOUIS, MO., APRIL 14, 1893.

The leading article in this issue on the law of libel in Pennsylvania, though presenting the subject from the standpoint of Pennsylvania authority and precedent, will be found of general interest and value, especially in States like Pennsylvania, where the principles of the law of libel are derived from the English decisions and have not been mutilated by statute.

Correspondents, in another column, very properly call our attention to the fact that the decision of the Alabama case of G. S. Ry. Co. v. Carrol, upon which we commented recently (36 Cent. L. J. 210), and which involved indirectly the fellow-servant law of Mississippi, was made with reference to the common law as it existed before the change effected by the new constitution and code of that State adopted last year, modifying the old common law which relieved the master from liability for injuries to one servant caused by the negligence of a co-servant. Of course, the opinion of the court as well as our remarks were predicated upon the law as it existed when the cause of action arose. The constitution and statutes of Mississippi have made radical changes in the law applicable to master and servant, as will be observed by reference to the letters of our correspondents.

Upon this subject we observe that legislation to amend the law defining and regulating the liability of employers for injuries to workmen is under consideration in England. The law which is intended to repeal that of 1890 provides that when, after the act goes into operation, personal injury is caused to a workman by reason of the negligence of any person in the service of the workman or employer, the workman or, in case of death, his representatives shall have the same right to compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in the work; provided, that a workman or his representatives shall not be entitled under the law to any right of compensation or remedy against the workman's employer in any case where the workman knew of the negligence which caused his injury and failed without reasonable excuse to give, or cause to be given, within a reasonable time, information thereof to his employer, or to some person superior to himself in the service of his employer. The law further provides that a contract whereby a workman relinquishes any right under the law shall not, if made before the accrual of the right, constitute a defense to any action brought for the recovery of compensation under the law.

Where, however, an employer has contributed to a fund providing any benefit for a workman or his representatives in case of injury or death, then, in the event of the workman or his representatives electing to sue the employer for compensation instead of claiming against the fund, the employer is to be entitled, in the place of the workman or his representatives, to any money payable out of the fund.

It is provided that the act shall apply to persons who, being laborers, servants in husbandry, journeymen, artificers, handicraftsmen or miners, or otherwise engaged in manual labor, have entered into or work under a contract of service with employers, whether the contracts are express or implied, are verbal or in writing, and are contracts of service or contracts personally to execute any work, all railway servants, all persons employed in or about public conveyances by land, or in or about vessels engaged in inland navigation, and all seamen employed on board British ships. Domestic or menial servants are not, however, included. It is finally provided that nothing in the act shall affect any right or remedy to which a workman is entitled independently of the new law, and that nothing in the law shall affect any contract existing at the commencement of the law between a workman and employer during the continuance of the contract, but that where any such contract is incidental to a contract of service it shall not, for the purpose of the law, be deemed to continue after the time at which the contract of service would determine if notice of the determination thereof were given at the commencement of the law.

NOTES OF RECENT DECISIONS.

FOREIGN CORPORATIONS—ATTACHMENT OF CORPORATE STOCK—GARNISHMENT.—Rev. St. Mo. 1889, §540, provides that shares of stock in any corporation may be attached in the same manner as the same may be levied upon under execution. Sections 4915, 4924, 4925, 4953, provide that, when execution issues against an owner of stock in a corporation, an officer thereof shall furnish the sheriff a certificate of the number of shares held by defendant, and the levy shall be made by leaving a copy of the writ with the secretary or other officer with a certificate from the sheriff that he levies on the shares to srtisfy the execution and, when such shares are sold, the officer shall execute to the purchaser a bill of sale conveying the same and give the secretary of the corporation a copy of the execution with his return thereon. It was held by the Supreme Court of Missouri in Armour Bros. Banking Co. v. Smith, 20 S. W. Rep. 690, that the statutes apply to domestic corporation only, and that notice to the corporation, being essential thereunder, a simple seizure under attachment and sale of the paper certificate of a foreign corporation conveys no title to the stock, and that in the absence of any statutory provision certificates of stock in a foreign corporation are not subject, as choses in action, to garnishment process under a writ of attachment. Thomas, J., said, after referring to the statutes above mentioned:

In regard to these provisions, we remark, in the first place, that, in our judgment, they apply to domestic corporations alone. It is true they are general enough to embrace corporations of other States and countries, but their details, prescribing the manner of seizing and conveying the shares of stock, point unerringly not only to corporations organized under the laws of this State, but also to corporations alone whose place of business is within the county and jurisdiction of the officer making the levy and sale. Beyond question, that provision, requiring the secretary of the corporation to furnish the sheriff with a certificate stating the number of shares held by the defendant in the execution, applies to domestic corporations alone, for it can, in the nature of things, have no vigor or force beyond the territorial limits of Missouri. And this is the construction given a statute couched in somewhat similar language by the Court of Appeals of New York in Plimpton v. Bigelow, *supra*, where it is said that such a statute "has an appropriate application to shares in domestic corporations. Such corporations are completely subject to the jurisdiction of our courts, and may be compelled to recognize a title to corporate shares, derived under proceedings by attachment. In respect to foreign corporations, such power does not exist, and it could scarcely be expected that the courts of another State would recognize a title to corporate stock in one of its own corporations, founded upon a sale under an attachment issued by our courts against a non-resident, when the only semblance of jurisdiction over the property was the service of notice in the attachment proceeding upon an officer or agent of the corporation here. . . . The abstract entity—the corporation—is the owner, and only owner, of the property. We do not doubt that shares for the purpose of attachment proceedings may be deemed to be in the possession of the corporation which issued them, but only at the place where the corporation by intendment of law always remains, to-wit, in the State or country of its creation. In all other places it is an alien. It may send its agents abroad or transact business abroad as any other inhabitant may do, without passing personally into the foreign jurisdiction, or changing its legal residence." And it was accordingly held that the statute applied to domestic corporations alone. In the second place, we say the court acquired no jurisdiction of the *res* in this case, because the levy of the attachment upon the shares of stock wholly failed to come up to the requirement of the statute. The sheriff did not—could not—comply with that provision requiring him to leave a copy of the writ with the secretary of the corporation. The entity— the corporation—was beyond his bailiwick, and beyond the confines of the State. Nor could the sheriff, for the same reason, make a valid transfer of this stock upon any sale he might make, the statute requiring him not only to deliver to the purchaser a bill of sale, but also to leave with the secretary of the corporation a copy of the execution, and his return thereon. The simple seizure and sale of the paper certificate is not enough. Notice to the corporation is essential under our statute to make a valid levy and sale.

But it is earnestly insisted that the certificates of the stock were choses in action, and, as such, were specifically subject to garnishment process under the writ of attachment. There has been much discussion as to the nature of the property of a shareholder in the stock of a corporation. "The right," says the Court of Appeals of New York, in Plimpton v. Bigelow, *supra*, "which a shareholder in a corporation has by reason of his ownership of shares is a right to participate, according to the amount of his stock, in the surplus profits of the corporation on a division, and ultimately on its dissolution in the assets remaining after the payment of its debts." Chief Justice Shaw, by way of a definition of a "share of stock," says: "The right is, strictly speaking, a right to participate, in a certain proportion, in the immunities and benefits of the corporation, to vote in the choice of their officers, to share in the dividends of profits, and to receive an aliquot part of the capital on winding up and terminating the active existence and operation of the corporation." Fisher v. Essex Bank, 5 Gray, 373. Mr. Justice Sharswood, in Neiler v. Kelley, 69 Pa. St. 403, says: "A share of stock is an incorporeal, intangible thing." Judge Holmes, in Foster v. Potter, *supra*, says; "The property interest of the shareholders is an intangible and invisible thing, and cannot be actually seized by the officer." And again, in the same case, he says: "Such property is neither a specific chattel nor a debt, but a mere chose in action." But, be that right what it may, "certificates of stock are not the stock itself; they are but evidence of the stock; and the stock itself cannot be attached by a levy of attachment on the certificate. As was

well said by the Supreme Court of Pennsylvania, stock cannot be attached by attaching the certificate any more than lands situated in another State can be attached by an attachment in Pennsylvania, served on the title deeds to such lands." Cook, Corp. § 485. 'Shares of stock in a corporotion are personal property, whose location is in that State where the corporation is created. . . . Considered as property separated from its owner, stock is in existence only in the State of the corporation." *Id.* In Young v. Iron Co., 85 Tenn. 189, 2 S. W. Rep. 202, the Supreme Court of Tennessee said: "If the presence within the State of the stock certificates was essential in determining the *situs* of the stock, then it is admitted that the certificates were, both in contemplation of law as well as in fact, with the person of Powell, who was a non-resident. But these stock certificates were the mere evidences of the ownership of the shares,—*iridia* of his interest in the earnings and profits of the company. Their seizure by an execution or by an attachment would not be a seizure or levy upon the stock itself, without more. Notice to the corporation, or to the officer having charge of the books of the company, is essential in case of execution. . . . Hence the locality of the paper certificates, or their actual seizure, is unimportant." In Foster v. Potter, 37 Mo. 526, this court held that without an express statute shares of stock, even of domestic corporations, could not be seized as personal property or evidences of debt, and, if this cannot be done, it is too plain for argument that the shares of stock in a foreign corporation cannot be levied on by simply seizing a certificate which may happen to be in this State. It is not necessary in this case to define the limits of legislative power to authorize the seizure and sale, under judicial process, for the payment of debts, of certificates of stock of foreign corporations found in this State. It is sufficient for our present purpose to say that the legislature has not yet seen proper to go that far.

FRAUDS, STATUTE OF—AGREEMENTS RELATING TO LAND—SALE OF STANDING TIMBER.—In Hirth v. Graham, 33 N. E. Rep. 90, the Supreme Court of Ohio decide that a sale of standing timber, whether or not the parties contemplate its immediate severance and removal by the vendee, is a contract concerning an interest in lands, within the meaning of the statute of frauds, and is voidable by either party if not in writing. Bradbury, J., says *inter alia:*

Whether a sale of growing trees is the sale of an interest in or concerning land has long been a much controverted subject in the courts of England, as well as in the courts of the several States of the Union. The question has been differently decided in different jurisdictions, and by different courts, or at different times by the same court within the same jurisdiction. The courts of England, particularly, have varied widely in their holdings on the subject. Lord Mansfield held that the sale of a crop of growing turnips was within this clause of the statute. Emmerson v. Heelis, 2 Taunt. 38, following the case of Waddington v. Bristow, 2 Bos. & P. 452, where the sale of a crop growing hops was adjudged not to have been a sale of goods and chattels merely. And in Crosby v. Wadsworth, 6 East, 602, the sale of growing grass was held to be a contract for the sale of an interest in, or concerning, land, Lord Ellenborough saying: "Upon the first of these questions" (whether this purchase of the growing crop be a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them), "I think that the agreement stated, conferring as it professes to do, an exclusive right to the vesture of the land during a limited time and for given purposes, is a contract or sale of an interest in, or at least an interest concerning, lands." *Id.* 610. Afterwards, in Teal v. Auty, 2 Brod. & B. 99, the court of common pleas held a contract for the sale of growing poles was a sale of an interest in or concerning lands. Many decisions have been announced by the English courts since the cases above noted were decided, the tendency of which have been to greatly narrow the application of the fourth section of the statute of frauds to crops, or timber, growing upon land. Crops planted and raised annually by the hand of man are practically withdrawn from its operation, while the sale of other crops, and in some instances growing timber, also, are withdrawn from the statute, where, in the contemplation of the contracting parties, the subject of the contract is to be treated as a chattel. The latest declaration of the English courts upon this question is that of the common pleas division of the high court of justice, in Marshall v. Green, 1 C. P. Div. 35, decided in 1875. The syllabus reads: "A sale of growing timber to be taken away as soon as possible by the purchaser is not a contract or sale of land, or any interest therein, within the fourth section of the statute of frauds." This decision was rendered by the three justices who constituted the common pleas division of the high court of justice, Coleridge, C. J., Brett and Grove, JJ., whose characters and attainments entitle it to great weight; yet, in view of the prior long period of unsettled professional and judicial opinion in England upon the question, that the court was not one of final resort, and that the decision has encountered adverse criticism from high authority (Benj. Sales [Ed. 1892], § 126), it cannot be considered as finally settling the law of England on this subject. The conflict among the American cases on the subject cannot be wholly reconciled. In Massachusetts, Maine, Maryland, Kentucky, and Connecticut sales of growing trees, to be presently cut and removed by the vendee, are held not to be within the operation of the fourth section of the statute of frauds. Claflin v. Carpenter, 4 Metc. (Mass.) 580; Nettleton v. Sikes, 8 Metc. (Mass.) 34; Bostwick v. Leach, 3 Day, 476; Erskine v. Plummer, 7 Me. 447; Cutler v. Pope, 13 Me. 377; Cain v. McGuire, 13 B. Mon. 340; Byassee v. Reese, 4 Metc. (Ky.) 372; Smith v. Bryan, 5 Md. 141. In none of these cases, except 4 Metc. (Ky.) 373, and in 13 B. Mon. 340, had the vendor attempted to repudiate the contract before the vendee had entered upon its execution, and the statement of facts in those two cases do not speak clearly upon this point. In the leading English case before cited (Marshall v. Green, 1 C. P. Div. 35), the vendee had also entered upon the work of felling the trees, and had sold some of their tops before the vendor countermanded the sale. These cases, therefore, cannot be regarded as directly holding that a vendee, by parol, of growing timber, to be presently felled and removed, may not repudiate the contract before anything is done under it; and this was the situation in which the parties to the case now under consideration stood when the contract was repudiated. Indeed, a late case in Massachusetts (Giles v. Simonds, 15 Gray, 441), holds that "the owner of land, who has made a verbal

contract for the sale of standing wood to be cut and severed from the freehold by the purchaser, may at any time revoke the license which he thereby gives to the purchaser to enter his land to cut and carry away the wood, so far as it relates to any wood not cut at the time of the revocation." The courts of most of the American States, however, that have considered the question, hold expressly that a sale of growing or standing timber is a contract concerning an interest in lands, and within the fourth section of the statute of frauds. Green v. Armstrong, 1 Denio, 550; Bishop v. Bishop, 11 N. Y. 123; Westbrook v. Eager, 16 N. J. Law, 81; Buck v. Pickwell, 27 Vt. 157; Cool v. Lumber Co., 87 Ind. 531; Terrell v. Frazier, 79 Ind. 473; Owens v. Lewis, 46 Ind. 488; Armstrong v. Lawson, 73 Ind. 498; Jackson v. Evans, 44 Mich. 510, 7 N. W. Rep. 79; Lyle v. Shinnebarger, 17 Mo. App. 66; Howe v. Batchelder, 49 N. H. 204; Putney v. Day, 6 N. H. 430; Bowers v. Bowers, 95 Pa. St. 477; Daniels v. Bailey, 43 Wis. 566; Lillie v. Dunbar, 62 Wis. 198, 22 N. W. Rep. 467; Knox v. Haralson, 2 Tenn. Ch. 232. The question is now, for the first time, before this court for determination; and we are at liberty to adopt that rule on the subject most conformable to sound reason. In all its other relations to the affairs of men, growing timber is regarded as an integral part of the land upon which it stands; it is not subject to levy and sale upon execution as chattel property; it descends with the land to the heir, and passes to the vendor with the soil. Jones v. Timmons, 21 Ohio St. 596. Coal, petroleum, building stone, and many other substances constituting integral parts of the land, have become articles of commerce, and easily detached and removed, and, when detached and removed, become personal property, as well as fallen timber; but no case is found in which it is suggested that sales of such substances, with a view to their immediate removal, would not be within the statute. Sales of growing timber are as likely to become the subject of fraud and perjury as are the other integral parts of the land, and the question whether such sale is a sale of an interest in or concerning lands should depend, not upon the intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty. This rule has the additional merit of being clear, simple, and of easy application,—qualities entitled to substantial weight in choosing between conflicting principles. Whether circumstances of part performance might require a modification of this rule is not before the court, and has not been considered.

POSTMASTER — LIABILITY FOR NEGLIGENCE OF CLERK—LOSS OF REGISTERED LETTERS.—In Raisler v. Oliver, 12 South. Rep. 238, the Supreme Court of Alabama decide that a postmaster who employs a clerk or assistant without express authority and who is paid by the postmaster out of his own salary or means is liable, under the doctrine of *respondeat superior*, for the default or misfeasance of his clerk or assistant, as any private person for the act of his agent or employee. It was also held that a postmaster's liability for moneys or letters received by him in his official capacity is not that of a common carrier, and proof that the letters containing money were delivered to him or his agent in his presence and by his direction for registration and of their loss without evidence of negligence resulting in their loss is insufficient to authorize a recovery against him.

MUNICIPAL CORPORATION—NEGLIGENT CONSTRUCTION OF MARKET PLACE.—The case of Barron v. City of Detroit, as cited by the Supreme Court of Michigan, involves an interesting question as to the liabity of municipal corporations for negligence in the construction of buildings. The holding is that where a city under the provisions of its charter, erects a market place, it is exercising a private or proprietary right and is held to the same degree of care in the preparation and adoption of plans and in the construction thereof, as a private corporation or individual and liable for negligence to the same extent. Long, J., says:

It is contended by counsel for the city that when the common council of the city authorized the making of plans and specifications for the market building, and directed the making of the contracts for its construction, it performed a purely legislative function; that the fault which occasioned the collapse of the building was in the plan, which failed to provide for anchoring it so that it could not be lifted from its foundation by the wind; that there was evident miscalculation as to the weight being sufficient to keep it in place. Counsel insists that the fault is with legislative action, and therefore a suit grounded upon it is grounded upon a wrong attributable to the legislative body itself, as the determination to construct the public work, and the prescribing of the plans, are matters of legislation on behalf of the city, under the direction of its legislative body; that in carrying out the plans there may be negligence attributable to ministerial officers, but negligence in the plans themselves must be attributable to the body that devised, ordered, or adopted it,—and therefore the action cannot be maintained, under the principle applied in Larkin v. Saginaw Co., 11 Mich. 88; Detroit v. Beckman, 34 Mich. 126; City of Lansing v. Toolan, 37 Mich. 152; Davis v. City of Jackson, 61 Mich. 530, 28 N. W. Rep. 526. This contention would undoubtedly be correct, if the city had been acting purely in a matter of public concern, in its governmental capacity or character, and the cases cited would then be applicable. In Larkin v. Saginaw Co. the plaintiff sought to recover for injuries caused by a defective bridge, and it was held that the county was not liable for the acts of the board of supervisors in the exercise of its legislative power. In Detroit v. Beckman, City of Lansing v. Toolan, and Davis v. City of Jackson, the actions were for injuries caused by defects in public highways. In each of these cases it was held that, when complaint is made that the original plan of a public work is so defective as to render the work dangerous when completed, the fault is with legislative action, and for which no action can be maintained. Ashley v. Pt. Huron, 35 Mich. 296, is to the same effect. Judge Dillon, in his work on Municipal Corporations (3d Ed., § 66) states the rule as follows: A municipal corpora-

tion "possesses a double character: The one, governmental, legislative, or public; the other, in a sense, proprietary or private. The distinction between these, though sometimes difficult to trace, is highly important, and is frequently referred to, particularly in the cases relating to the implied or common law liability of municipal corporations for the negligence of their servants, agents or officers, in the execution of corporate duties and powers. On this distinction, indeed, rests the doctrine of such implied liability. In its governmental or public character, the corporation is made, by the State, one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good, on behalf of the State, rather than for itself. In this respect it is assimilated, in its nature and functions, to a county corporation, which, as we have seen, is purely part of the governmental machinery of the sovereignty which creates it. Over all its civil, political, or governmental powers the authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in the constitution of the particular State. But in its proprietary or private character, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the State at large, but for the private advantage of the compact community, which is incorporated as a distinct legalpersonalty, or corporate individual; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded, *quo ad hoc*, as a private corporation, or at least not public in the sense that the power of the legislature over it, or the right represented by it is omnipotent." This rule is supported by a great number of authorities from the several States, and from the decisions of the Supreme Court of the United States, in the note to the section above quoted. It is however, challenged by Denio, C. J., in Darlington v. Mayor, 31 N. Y. 164. He asserts the unlimited power of the legislature over municipal corporations and their property, and maintains that such corporations are altogether public, and all their rights and powers public in their nature, and that their property, though held for income or sale, and unconnected with any use for the purpose of municipal government, is under the control of the legislature, and not within the provisions of the constitution protecting private property. He denies the distinction between the public and private functions of city government, and maintains that, as respects the State, all their powers and functions are public. This doctrine, however, has not obtained in this State; but it is held that cities are mentioned in our constitution, in connection with local corporations, which are put upon a proper basis entirely beyond legislative interference, so far as local independence of action is concerned. Opinion of Campbell, C. J., in People v. Hurlbut, 24 Mich. 86. In Board of Park Com'rs v. Common Council of Detroit, 28 Mich. 228, it was said by Mr. Justice Cooley: "We also referred in People v. Hurlbut to several decisions in the federal supreme court, and elsewhere, to show that municipal corporations considered as communities endowed with peculiar functions for the benefit of their own citizens have always been recognized as possessing powers and capacities, as being entitled to exemptions, distinct from those which they possess or can claim as conveniences in State government. If the authorities are examined, it will be found that these powers and capacities and interests which are acquired under them are usually spoken of as private, in contradiction to those in which the State is concerned, and which are called public; thus putting these corporations, as regards all such powers, capacities, and interests, substantially on the footing of private corporations." This same distinction was also made in Detroit v. Corey, 9 Mich. 164; Mayor v. Park Com'rs, 44 Mich. 602, 7 N. W. Rep. 180; Niles Waterworks v. City of Niles, 59 Mich. 324, 26 N. W. Rep. 525; Cooper v. Detroit, 42 Mich. 584, 4 N. W. Rep. 262. Under the facts in the case, the city must be held to the same degree of care, not only in the construction, but in the plan of the construction itself, as would a private corporation or an individual. Under the provisions of the charter granting the power to erect it, there was no imperative duty cast upon the city to provide for a market building. It could build it or not, as the council might determine. It is not like the case of a public highway, or the building of a bridge, where the duty is cast upon the municipality, by general law, to build and maintain them.

STATE COURTS—JURISDICTION—ENFORCING LIEN ON VESSEL.—In Atlantic Works v. The Glide, it is decided by the Supreme Judicial Court of Massachusetts, that the courts of a State have jurisdiction to enforce by a proceeding *in rem* liens given by its laws for labor and materials furnished, notwithstanding Rev. St. U. S. § 563, subd. 8, and § 711, subd. 3, giving the United States District Courts exclusive jurisdiction of "all civil causes of admiralty and maritime jurisdiction, saving to suitors the right of a common law remedy in all cases where the common law is competent to give it." Morton & Knowlton, JJ., dissent in vigorous opinion. The court says, *per* Holmes, J.:

There is no doubt that, when the maritime law gives a lien and a proceeding *in rem*, a State statute cannot give the State courts concurrent jurisdiction by professing to create a similar statutory lien. The attempt to do so would be contrary to Rev. St. U. S. § 563, Subd. 8. and *Id.* § 711, Subd. 3; and the State law would be void. The Hine v. Trevor, 4 Wall. 555, 569; The Moses Taylor, *Id.* 411; The Belfast, 7 Wall. 624.

Most of the latter decisions and *dicta* go further, and deny the power of State statutes to confer jurisdiction of a proceeding *in rem*, upon the State courts, even when the maritime law does not give a lien, if the contract secured by the statutory lien is maritime, as in the case of repairs to a vessel in her home port. Warren v. Kelley, 80 Me. 512, 15 Atl. Rep. 49; Weston v. Morse, 40 Wis. 455; The Petrel v. Dumont, 28 Ohio St. 602; Crawford v. The Caroline Reed, 42 Cal. 469; Dever v. The Hope, 42 Miss. 715; *In re* Josephine, 39 N. Y. 19; Sheppard v. Steele, 43 N. Y. 52; Brookman v. Hamill, *Id.* 554, 557; Pooel v. Kermit, 59 N. Y. 554; The John Farron, 14 Blatchf. 24, 26; The Guiding Star, 18 Fed. Rep. 263, 267; The Madrid, 40 Fed. Rep. 677, 680.

On the other hand, there are decisions and *dicta* the other way, including one case in this court. Donnell v. The Starlight, 103 Mass. 227, 230; Dock Co. v. Gibson, 22 La. Ann. 623; Williamson v. Hogan, 46 Ill.

504; Mitchell v. The Magnolia, 45 Mo. 67; Boylan v. The Victory, 40 Mo. 244.

The Supreme Court of the United States has given no decision upon the question. Had it done so, of course we should defer to its authority upon a matter of which it is a final judge. But, until there is a direct adjudication by the only tribunal whose decision is an authority, we feel bound to exercise our own judgment upon the merits of the case. The *dicta* which have been uttered in rendering decisions of the supreme court have not been consistent. In The Lottawanna, 21 Wall. 558, 580, the jurisdiction of the State court is denied. In earlier cases, and, if we interpret their language rightly, in later ones, it is said or implied that the State courts can act. Johnson v. Elevator Co., 119 U. S. 388, 399, 7 Sup. Ct. Rep. 254; Norton v. Switzer, 93 U. S. 355, 365, 366; The Belfast, 7 Wall. 624, 645, 646; The St. Lawrence, 1 Black, 522, 530, 521; Maguire v. Card, 21 How. 248, 251.

The ground for denying the jurisdiction when the maritime law gives a lien is wanting here. The ground in that class of cases, as has been stated again and again, is that the State law purporting to create a parallel lien and a parallel jurisdiction is void (The Hine v. Trevor, 4 Wall. 555, 569; The Belfast, 7 Wall. 624, 644; Johnson v. Elevator Co., 119 U. S. 388, 397, 7 Sup. Ct. Rep. 254); but it has been decided, and it still is assummed by the Supreme Court of the United States, that State laws creating liens like the one before us are valid, and, whatever might be our opinion were the question open to us, we proceed on that assumption without argument (Peyrous v. Howard [The Planter], 7 Pet. 324; The St. Lawrence, 1 Black, 522; *Ex Parte* McNiel, 13 Wall. 236, 243; The Lottawanna, 21 Wall. 558, 581; The Corsair, 145 U. S. 335, 347, 12 Sup. Ct. Rep. 949.)

If the statute creating the lien is valid, then it would be strange, to say the least, if the law which creates a right were incompetent to protect it, and we are justified in looking with some nicety at an argument which leads to that result. The main argument against the jurisdiction seems to be that the liens derives its quality from the contract; and that as the latter is maritime the former must be, and, as a maritime lien, solely within the jurisdiction of the district court; or that the statute giving the district courts jurisdiction "of all civil cases of admiralty and maritime jurisdiction" excludes the State courts from all proceedings in aid of a maritime contract except such as fall within the description of a "common-law remedy," in the saving clause; and that proceedings *in rem* to enforce the statutory lien or a remedy for the enforcement of the contract secured by the lien.

But if the lien created by the State law were "maritime in a strict sense, it would be the duty, and not merely the right, of the admiralty courts to enforce it. We do not understand the Supreme Court of the United States to assert the right to abolish libels *in rem* generally by rule. Yet in the successive changes of the twelfth admiralty rule it has asserted and exercised the right to regulate and to permit or to deny proceedings *in rem* in the admiralty to enforce liens of domestic material men. Moreover, as was said in The Belfast, 7 Wall. 644, "State legislatures have no authority to create a maritime lien;" and that proposition, as we nave observed above, was the ground of decision in that class of cases.

Again, if the lien were a mere matter of remedy, and were simply a right to a proceeding *in rem* as a mode of enforcing the contract to which it is attached, then, if the State law purported to attach one to a maritime contract, it would be equivalent to saying that there shall be a process *in rem* in the admiralty in suits to enforce such contracts, and the question would arise how a State legislature could impose a new process upon a court outside of its power. Traces of such a doubt are to be seen occasionally. The Red Wing, 14 Fed. Rep. 869, 871; The Edith, 11 Blatchf. 451, 454, 94 U. S. 518. Compare The Milford, Swab. 362. Yet the supreme court sustains the law, as has been shown, and, under the present admiralty rule 12, the United States Admiralty Courts may take jurisdiction to enforce the lien.

We do not understand that the supreme court ever has intimated that the operation of the State law is dependent upon the admiralty rule for the time being; so that when the district courts do not enforce the lien the State courts may do so, but when a rule like the present is in force the legislature cannot give them jurisdiction. 'We understand that, if the legislature has the power at any time, it has it at all times, whatever the admiralty rule may be.

It appears to us that the decisions sustaining the law and the power of the admiralty court to take jurisdiction under it are grounded on the assumption that such a lien is not a mere matter of remedy, but is a right of property, and as such is distinct from the proceeding *in rem* by which it is enforced. The Rock Island Bridge, 6 Wall. 213, 215; The Maggie Hammond, 9 Wall. 435, 456; ***Ex parte*** Niel, 13 Wall. 236, 243; The Lottawanna, 21 Wall. 558, 579; The Young Mechanic, 2 Curt. 404; The Havana. 1 Spr. 402; The Mary Ann, L. R. 1 Adm. Ecc. 8, 11; The Two Ellens, L. R. 4 P. C. 161. If this be so, it no more follows from the fact that the contract may give rise to a "civil cause of admiralty jurisdiction" that enforcement of the lien is such a cause than it follows that the foreclosure of a mortgage given to secure the same contract would be; nor does it seem to us to matter that the mode of enforcement is by a proceeding *in rem*. State courts can enforce liens not maritime by proceedings *in rem*. Foster v. The Richard Busteed, 100 Mass. 409; McDonald v. The Nimbus, 137 Mass. 360; Edwards v. Elliott, 21 Wall. 532.

It may be asked how, if the lien is not maritime, the admiralty courts can be justified in enforcing it. It may be, as suggested by Bradley, J., in The Lottawanna, 21 Wall. 558, 580, that the United States courts did so in imitation of the colonial courts upon succeeding to them, and that the answer is to be sought in history, rather than in logic. Of course such liens would be recognized in any event when law and justice required it in the distribution of proceeds. The Harrison, 2 Abb. (U. S.) 74; The Cargo Ex Galam, 2 Moore, P. C. (N. S.) 216, 236.

In the absence of convincing reasons or binding authority the other way, we feel bound to follow the case of Donnell v. The Starlight, to the full extent of the proposition there laid down as settled, —"that the courts of a State have jurisdiction to enforce liens, created by its laws, for labor and materials furnished in constructing or repairing domestic vessels."

PRINCIPLES OF LIBEL IN PENNSYLVANIA.

A libel has been defined to be any malicious publication, written, printed or painted, which by words or signs, tends to expose a person to contempt, ridicule, hatred or dégra-

dation of character.[1] The right to print or publish any article concerning any person arises from and is limited by art. 1, § 7, of the constitution of 1874, and is expressed thus: "The printing press shall be free to every person who may undertake to examine the proceedings of the legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being only responsible for the abuse of that liberty. [No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury, and in all indictments for libels the jury shall have the right to determine the law and the facts under the direction of the court as in other cases.]" The portion of the section enclosed in brackets is new; the balance thereof is to be found in the constitution of 1838. The new portion refers only to a trial upon an indictment for libel, and does not apply to a civil action to recover damages.[2] It will be seen from the section of the constitution quoted that a privileged communication in a criminal prosecution is defined with more precision and more fully in it, than is a privileged communication in a civil action, and that the essential elements which constitute a privileged communication in the one, may be the same as those which constitute a privileged communication in the other. The rule by which we are to determine whether a publication is privileged or not is the same in both instances, and is said to be one which is made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made in good faith the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved before there can be a recovery.[3] If a communication is privileged no recovery can be had without proof of actual malice. The section quoted above invests all publications relating to the subjects enumerated in the part enclosed in brackets with a qualified privilege which is the privilege which protects the publisher so far as he is speaking honestly for the common good[4]—without malice or negligence.[5] In privileged communications in criminal cases the prerequisites necessary to constitute it are that the matter be proper for publication, and the subject one about which the public has an interest to be informed; that the publication be made for the honest purpose of giving to the public information which it is entitled to have, and if it is untrue in point of fact, that the publisher had reasonable cause for believing it to be true, did not carelessly or negligently assume its truth or publish it indifferent to whether it was true or false.[6] It has been claimed that it is the province of the jury to determine whether a communication is privileged or not, and that it had the legal right as distinguished from the power in violation of its duty to be judges of the law as well of the facts, and this view arose from the words in § 7, of the constitution, *supra*, "and in all indictments for libel the jury shall have the right to determine the law and the facts under the direction of the court as in other cases." The recent case of Com. v. McManus, 143 Pa. 64, has decided that it is the court's province to determine the law, and where the facts are undisputed the question of privilege is one for the judge alone. The jury has the right to determine the joint result of the law and the facts by general verdict. "The question of propriety for public discussion is essentially a question of reasonableness. Is it reasonable to bring a matter before the public? Is it reasonably necessary for the public good to subject a man's conduct to public investigation? These are substantially the questions to be answered, the answer the law arises out of the facts. Wherever therefore the facts are undisputed, and capable of a single inference, there is nothing for a jury to find, and the question becomes one purely of law; for in such cases reasonableness belongeth to the knowledge of the law, and is to be determined by the justices." Com. v. Costello, *supra*. Prosecutions or suits for libel are of rare occurrence, and the list of

[1] Neeb v. Hope, 111 Pa. Rep. 145.
[2] Barr v. Moore, 87 Pa. 385.
Briggs v. Garrett, 111 Pa. 409.
[4] Odger's, L. & S. 132.
[5] Art. 1, § 7.
[6] Com. v. Costello, 1 Dist. Pa. R. 392.

man's actions which it has been decided the newspaper is at liberty to discuss and criticise is not large. In Barr v. Moore, 87 Pa. 390, the court says: "The liberty of the press should at all times be justly guarded and protected, but so should the reputation of the individual against calumny. * * * This right is not one of unlimited license, but is restrained by legal responsibility. In the Declaration of Rights, reputation and property are put on the same high ground. This language naturally flows from the doctrine of the common law. * * * The security of his reputation or good name from the arts of detraction and slander are rights to which every man is entitled by reason and natural justice. The reason given is that without this it is impossible to have the perfect enjoyment of any other advantage or right. 1 Black. Com. 134."

In Com. v. Brown, 1 Dist. (Pa.) R. 565, the court of common pleas takes the ground that the character or reputation of a private citizen is not a proper subject for investigation or information. It is placed on such high grounds that it is only permissible to bring it in question, and subject it to criticism when the public interest and welfare make it justifiable, and only then when done with proper motives. "That the publisher of a newspaper may make a fair record of current events; that he may report the proceedings of courts of justice; that he may discuss the character of those who hold themselves out to the public as ministers or teachers or candidates for office; that he may discuss the management of public institutions; that he may consider matters of interest to tax-payers, will not be doubted. Such publications must be made, however, in good faith, and from a proper motive." This case is well considered, and based upon well established legal principles, decides no new point, and it would seem that it was a fair statement of the law, with the exception that the right of a publisher to publish mere arbitrary selections from the testimony in any legal proceeding, whether in a court of record or not, consisting of those portions which impute crime or moral turpitude to or cast odium upon the party to whom they refer, and commending themselves by so-called spiciness, has been denied in Com. v. Costello, *supra*, and affirmed by the supreme court when the case was before it upon a special *allocatur* based upon a petition embodying the principle stated.

This decision is a step forward toward that position where private character and domestic happiness will be safe from the danger of damage and demolition at the hands of reporters of court proceedings who are thoughtless of the consequences of the publication to the persons involved, who give to the public information of court proceedings which it is eager to know, but which it ought not to know until the truth of the accusation or statement has been established by final decree. The court quotes with approval Lord Ellenborough, C. J., in Stites v. Nokes, 7 East 503. "It often happens that circumstances necessary for the sake of public justice to be disclosed by a witness in a judicial inquiry are very distressing to the feelings of the individuals on whom they reflect; and if such circumstances were afterward wantonly published, I should hesitate to say that such unnecessary publication was not libelous merely because the matter had been given in evidence in a court of justice." Bailey, J., in R. v. Creevey, 1 M. & S. 281, says: "It has been argued that proceedings in a court of justice are open to publication. Against that, as an unqualified proposition I enter my protest. * * * Would anyone be at liberty to poison the minds of the public by circulating that which for the purposes of justice, the court is bound to hear? I should think not; and it is not true therefore, that in all instances the proceedings of a court of justice may be published." Upon this principle it was held that there was no privilege attaching to the publication of a trial which contained matters "defamatory, seditious, blasphemous, or indecent,"[7] or of a scandalous affidavit made in a court of justice.[8] The first requisite, propriety of the publication, being apparent, and the question of negligence being out of the case, there can be no conviction unless there be proof of malice.[9] There is no requirement as to what the form of the evidence shall be. It may be extrinsic, by proof of personal ill-will, of known falsity, of absence of probable cause, or of anything, although it be but the presumption of innocence, that fairly and rea-

[7] R. v. Carlisle, 3 B. & A. (5 E. C. L.) 167.
[8] R. v. Salisbury, 1 Ld. Raymond, 341.
[9] Com. v. Singerly, 38 Leg. Int. (Pa.) 177.

sonably tends to overcome the *prima facie* privilege, or it may be intrinsic from the style and tone of the publication.[10] If malice be proved the qualified privilege otherwise attaching is lost at once.[11] But the question of malice or no malice is for the jury.[12] Every publication, having the other qualities of libel, if wilful and unprivileged, is in law malicious. Legal malice exists where a wrong act is done intentionally. It is a matter of law for the court to determine whether the occasion of writing that which would otherwise be actionable repels the inference of malice, and thus constitutes a privileged communication. If it be a privileged communication, and there be no extrinsic or intrinsic evidence of malice, it is the duty of the court to direct a non-suit for defendant. If however, the communication contains expressions which exceed the limits of privilege, such expressions are evidence of malice, and the case may be given to the jury.[13]

The two preliminary questions to be determined by the court before submitting the structure and language of the publication to the jury as evidence of malice are whether they are such as to be consistent with an honest and lawful intention, and therefore incapable of serving as the basis of a finding of actual malice,[14] or such as exceed the reasonable proprieties of the occasion, and are therefore capable of sustaining a finding of malice;[15] and also whether the objectionable comments or expressions are relevant to the matter for which the privilege of propriety for publication is claimed or unconnected with the same, in which latter case besides being evidence of malice in the publication of such matter, they are themselves to be treated as something apart from the privileged matter, and unprivileged, whether there be actual malice or not.[16] The truth of the publication is a defense to an action for libel,[17] but it is not in a criminal prosecution. The sense in which words would naturally be received by the world is that which ought to be given to an alleged libelous publication;[18] and is a question for the jury, upon which the court may advise but not direct. When the publication has been adjudged to be libelous, every one in any way connected in the publication of it is equally responsible for all the damages which flow from that publication.[19] In Bruce v. Read, *supra*, the following propositions are cited with approval. A master is liable for the wrongful acts of his servant when the injury is committed by authority of the master either expressly conferred, or fairly inferred from the nature of the employment and the duties thereby expressed.[20] He is liable for the act of his servant within the scope of his employment, and incident to the performance of the duties intrusted to him, although the specific act of injury be in opposition to the express and positive commands of his master.[21] The liability of the proprietors of a newspaper for the act of an agent, to whose management they have intrusted the paper is more broad. The proprietor is presumed to have published the libel which appears therein, and in a criminal prosecution therefor it is no defense for him to show that it was published without his knowledge or consent, and in his absence.[22] The very purpose of the employment of a reporter or editor is to collect information, and write articles for publication. If the proprietors impose such duties upon him, and give him such powers, limited only by his discretion, they are liable for injuries resulting from an act of his clearly incident to the performance of his duties, in the scope of his employment. He stands in their place. If the libel was written under the authority of his employment, and in furtherance of their business they are responsible whether the wrong resulted from his mere negligence or from a wanton and reckless purpose to accomplish the business in an unlawful manner.[23] The question whether a director of a corporation is individually liable in a criminal prosecution for libel has been raised in a recent case which was settled out of court, has not

[10] Conroy v. Pittsburg Times, 139 Pa. 339.
[11] Odgers, L. & S. 271.
[12] *Ibid.* 273.
[13] Neeb v. Hope, 111 Pa. 145.
[14] Odgers, L. & S. *283.
[15] Neeb v. Hope, *supra*.
[16] Odgers, L. & S. *282.
[17] Barr v. Moore, 87 Pa. 390.
[18] Com. v. Chambers, 39 Leg. Int. 208.
[19] Bruce v. Read, 104 Pa. 408.
[20] 1 Black. Com. 429. Wood on Master and Servant, § 279.
[21] *Ibid.* § 307.
[22] R. v. Walter, 3 Esp. 21; King v. Gutch, 1 Moody & Malkin, 433; Roscoe's Crim. Ev. 6 Am. Ed. 621; Com. v. Morgan, 107 Mass. 199.
[23] Howe v. Newmarch, 12 Allen, 49; Ramsden v. Boston & Albany R. R. Co., 104 Mass. 117; Hawes v. Knowles, 114 *Id.* 518.

been decided in Pennsylvania. It would seem that a director is not so liable. It is well settled that a corporation may be indicted and fined,[24] and that while a corporation is responsible in damages for the death of its employee caused by its negligence, the officers are not.[25] If the officers are not responsible in damages in an action why should they be held to a greater responsibility in a prosecution? It would be manifestly unfair and against reason to hold the representatives of the stockholders to a greater responsibility than the rest of the stockholders, and make it possible that the penalty of the sins of the corporation should fall upon those who carried out its will. There is a manifest difference between the positions which a partner and a director occupy in their respective business. The former represents himself only, is subject to no control or influence, and may dissolve the partnership, in most cases, if he is not in sympathy with its policy, but the latter is often necessarily the mouthpiece of others, and has no part in formulating the policy of the corporation.

But granting that he is a free agent and can do as he thinks best in the exercise of the power committed to him by his election, if he make a mistake, shall he be liable, and those who showed by electing him that they desired him to act for them as their representative go free. When it is decided that the director is liable individually, then the master will put his servant into the directorate, and regulate his movements from a place of safety.

The limited space allotted to articles in a journal render an extended review of this subject impracticable, and it has been the object of the writer to give in a concise form some of the principles of the law of libel which have been adopted by the Supreme Court of Pennsylvania, and which it will be seen follow closely the precedents established by the English cases.

GEORGE URQUHART.

[24] Pharmaceutical Society v. London Supply Asso.,5 App. Cas. 869, 870, 28 W. R.

[25] Bulloces v. Gaffigan, 100 Pa. 280.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS. — PREFERENCES — CONFLICT OF LAWS.

BARNETT V. KINNEY.

Supreme Court of the United States, February 6, 1893.

Under a deed of assignment for the benefit of creditors containing preferences which was made in Utah, the home of the assignee and is valid there, the assignee in possession of personal property of the assignor in Idaho has a better title thereto than a non-resident creditor of the assignor, who has subsequently attached such property, although the law in Idaho declares assignments for the benefit of creditors made there, which contain preferences, to be void.

Mr. Chief Justice FULLER, after stating the facts, delivered the opinion of the court:

The supreme court of the territory held that a non-resident could not make an assignment, with preferences, of personal property situated in Idaho, that would be valid as against a non-resident attaching creditor, the latter being entitled to the same rights as a citizen of Idaho; that the recognition by one State of the laws of another State governing the transfer of property rested on the principle of comity, which always yielded when the policy of the State where the property was located had prescribed a different rule of transfer from that of the domicile of the owner; that this assignment was contrary to the statutes and the settled policy of Idaho, in thatit provided for preferences; that the fact that the assignee had taken and was in possession of the property could not affect the result; and that the distinction between a voluntary and an involuntary assignment was entitled to no consideration.

Undoubtedly there is some conflict of authority on the question as to how far the transfer of personal property by assignment or sale, lawfully made in the country of the domicile of the owner, will be held to be valid in the courts of another country, where the property is situated, and a different local rule prevails.

We had occasion to consider this subject somewhat in Cole v. Cunningham, 133 U. S. 107, 129, 10 Sup. Ct. Rep. 269, and it was there said: "Great contrariety of State decision exists upon this general topic, and it may be fairly stated that, as between citizens of the State of the forum, and the assignee appointed under the laws of another State, the claim of the former will be held superior to that of the latter by the courts of the former; while, as between the assignee and citizens of his own State and the State of the debtor, the laws of such State will ordinarily be applied in the State of the litigation, unless forbidden by, or inconsistent with, the laws or policy of the latter. Again, although, in some of the States, the fact that the assignee claims under a decree of a court or by virtue of the law of the State of the domicile of the debtor and the attaching creditor, and not under a conveyance by the insolvent, is regarded as immaterial, yet, in most, the distinction between involuntary transfers of property, such as work by operation of law, as foreign bankrupt and insolvent laws, and a voluntary conveyance is recognized. The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be valid everywhere, being the exercise of the personal right of the owner to dispose of his own, while an assignment by operation of law has no legal operation out of

the State in which the law was passed. This is a reason which applies to citizens of the actual *situs* of the property when that is elsewhere than at the domicile of the insolvent, and the controversy has chiefly been as to whether property so situated can pass even by a voluntary conveyance."

We have here a voluntary transfer of his property by a citizen of Utah for the payment of his debts, with preferences, which transfer was valid in Utah, where made, and was consummated by the delivery of the property in Idaho, where it was situated, and then taken on an attachment in favor of a creditor not a resident or citizen of Idaho. Was there anything in the statutes or established policy of Idaho invalidating such transfer?

Title 12 of part 3 of the Revised Statutes of the Territory of Idaho, entitled "Of proceedings in insolvency" (Rev. St. §§ 5875-5932), provided that "no assignment of any insolvent debtor, otherwise than as provided in this title, is legal or binding on creditors;" that creditors should share *pro rata*, "without priority or preference whatever;" for the discharge of the insolvent debtor upon compliance with the provisions of the title, by application for such discharge by petition to the district court of the county in which he had resided for six months next preceding, with schedule and inventory annexed, giving a true statement of debts and liabilities, and a description of all the insolvent's estate, including his homestead, if any, and all property exempt by law from execution. The act applied to corporations and partnerships, and declared that, if the partners resided in different counties, that court in which the petition was first filed should retain jurisdiction over the case. Nothing is clearer from its various provisions than that the statute had reference only to domestic insolvents. As pointed out by Judge Berry in his dissenting opinion, the first section of the 58 upon this subject, in providing that "every insolvent debtor may, upon compliance with the provisions of this title, be discharged from his debts and liabilities," demonstrates this. The legislature of Idaho certainly did not attempt to discharge citizens of other jurisdictions from their liabilities, nor intend that personal property in Idaho, belonging to citizens of other States or territories, could not be applied to the payment of their debts unless they acquired a six months' residence in some county of Idaho, and went through its insolvency court.

The instrument in controversy did not purport to be executed under any statute, but was an ordinary common-law assignment, with preferences, and as such was not, in itself, illegal. Jewell v. Knight, 123 U. S. 426, 434, 8 Sup. Ct. Rep. 193. And it was found as a fact that it was valid under the laws of Utah. While the statute of Idaho prescribed *pro rata* distribution, without preference, in assignments under the statute, it did not otherwise deal with the disposition of his property by a debtor, nor prohibit preferences between non-resident debtors and creditors through an assignment valid by the laws of the debtor's domicile. No just rule required the courts of Idaho, at the instance of a citizen of another State, to adjudge a transfer, valid at common law and by the law of the place where it was made, to be invalid, because preferring creditors elsewhere, and therefore in contravention of the Idaho statute and the public policy therein indicated in respect of its own citizens, proceeding thereunder. The law of the *situs* was not incompatible with the law of the domicile.

In Halstead v. Straus, 32 Fed. Rep. 279, which was an action in New Jersey, involving an attachment there by a New York creditor as against the voluntary assignee of a New York firm, the property in dispute being an indebtedness of one Straus, a resident of New Jersey, to the firm, Mr. Justice Bradley remarked: "It is true that the statute of New Jersey declares that assignments in trust for the benefit of creditors shall be for their equal benefit, in proportion to their several demands, and that all preferences shall be deemed fraudulent and void; but this law applies only to New Jersey assignments, and not to those made in other States, which affect property or creditors in New Jersey. It has been distinctly held by the courts of New Jersey that a voluntary assignment made by a non-resident debtor, which is valid by the law of the place where made, cannot be impeached in New Jersey, with regard to property situated there, by non-resident debtors. Bently v. Whittemore, 19 N. J. Eq. 462; Moore v. Bonnell, 31 N. J. Law, 90. The execution of foreign assignments in New Jersey will be enforced by its courts as a matter of comity, except when it would injure its own citizens; then it will not. If Deering, Milliken & Co. were a New Jersey firm, they could successfully resist the execution of the assignment in this case. But they are not; they are a New York firm. New York is their business residence and domicile. The mere fact that one of the partners resides in New Jersey cannot alter the case. The New Jersey courts, in carrying out the policy of its statute for the protection of its citizens, by refusing to carry into effect a valid foreign assignment, will be governed by reasonable rules of general jurisprudence; and it seems to me that to refuse validity to the assignment in the present case would be unreasonable and uncalled for."

In May v. Bank, 122 Ill. 551, 13 N. E. Rep. 806, the Supreme Court of Illinois held that the provision in the statute of that State prohibiting all preferences in assignments by debtors applied only to those made in the State, and not to those made in other States; that the statute concerned only domestic assignments and domestic creditors; and the court, in reference to the contention that, if not against the terms, the assignment was against the policy of the statute, said: "An assignment giving preferences, though made

without the State, might, as against creditors residing in this State, with some reason, be claimed to be invalid, as being against the policy of the statute in respect of domestic creditors; that it was the policy of the law that there should be an equal distribution in respect to them. But, as the statute has no application to assignments made without the State, we cannot see that there is any policy of the law which can be said to exist with respect to such assignments, or with respect, to foreign creditors, and why non-residents are not left free to execute voluntary assignments, with or without preferences, among foreign creditors, as they may see fit, so long as domestic creditors are not affected thereby, without objection lying to such assignments that they are against the policy of our law. The statute was not made for the regulation of foreign assignments, or for the distribution, under such assignments, of a debtor's property among foreign creditors."

In Frank v. Bobbitt, 155 Mass. 112, 29 N. E. Rep. 209, a voluntary assignment made in North Carolina, and valid there, was held valid and enforced in Massachusetts, as against a subsequent attaching creditor of the assignors, resident in still another State, and not a party to the assignment. The supreme judicial court observed that the assignment was a voluntary, and not a statutory, one; that the attaching creditors were not resident in Massachusetts; that at common law, in that State, an assignment for the benefit of creditors which created preferences was not void for that reason; and that there was no statute which rendered invalid such an assignment when made by parties living in another State, and affecting property in Massachusetts; citing Train v. Kendall, 137 Mass. 366. Referring to the general rule that a contract, valid by the law of the place where made, would be regarded as valid elsewhere, and stating that "it is not necessary to inquire whether this rule rests on the comity which prevails between different States and countries, or is a recognition of the general right which every one has to dispose of his property or to contract concerning it as he chooses," the court said that the only qualification annexed to voluntary assignments made by debtors living in another State had been "that this court would not sustain them if to do so would be prejudicial to the interest of our own citizens, or opposed to public policy;" and added: "As to the claim of the plaintiffs that they should stand as will as if they were citizens of this State, it may be said, in the first place, that the qualification attached to foreign assignments is in favor of our own citizens as such, and, in the next place, that the assignment being valid by the law of the place where it was made, and not adverse to the interests of our citizens, nor opposed to public policy, no cause appears for pronouncing it invalid." And see, among numerous cases to the same effect, Butler v. Wendell, 57 Mich. 62, 23 N. W. Rep. 460; Receiver v. First Nat. Bank, 34 N. J. Eq. 450; Egbert v. Baker, 58 Conn. 319, 20 Atl. Rep. 466; Chafee v. Bank, 71 Me. 514; Ockerman v. Cross, 54 N. Y. 29; Weider v. Maddox, 66 Tex. 372, 1 S. W. Rep. 168; Thurston v. Rosenfield, 42 Mo. 474.

We do not regard our decision in Green v. Van Buskirk, 5 Wall. 307, 7 Wall. 139, as to the contrary. That case was fully considered in Cole v. Cunningham, *supra*, and need not be re-examined. The controversy was between two creditors of the owner of personalty in Illinois, one of them having obtained judgment in a suit in which the property was attached, and the other claiming under a chattel mortgage. By the Illinois statute such a mortgage was void as against third persons, unless acknowledged and recorded as provided, or unless the property was delivered to and remained with the mortgagee; and the mortgage in that case was not so acknowledged and recorded, nor had possession been taken. All parties were citizens of New York, but that fact was not considered sufficient to overcome the distinctively politic and cœrcive law of Illinois.

In our judgment the Idaho statute was inapplicable, and the assignment was in contravention of no settled policy of that territory. It was valid at common law, and valid in Utah, and, the assignee having taken possession before the attachment issued, the district court was right in the conclusions of law at which it arrived.

The judgment is reversed, and the cause remanded to the Supreme Court of the State of Idaho for further proceedings not inconsistent with this opinion. Judgment reversed.

NOTE.—The questions decided in the principal case have been very much controverted. When legal rights are sought in any country, of course they must be obtained under the laws of that country; the laws of other countries have no extraterritorial force, and when they are recognized elsewhere it is only by way of comity. Assignments for the benefit of creditors are valid at common law, but are now generally regulated by statute. Such assignments when made in other jurisdictions are held to be valid, unless they are prejudicial to the citizens or are contrary to the public policy where they are sought to be enforced. A distinction is drawn between voluntary assignments and those made under a compulsory law. The title of the assignee under a voluntary assignment is recognized in other countries, and he may sue there to enforce his rights. Lichtenstein v. Gillett, 37 La. Ann. 522; Thompson v. Fry, 51 Hun, 296. A voluntary conveyance, valid where the owner resides, operates to convey personal property wherever it is situate, since the *lex domicilii* governs. Thompson v. Fry, *supra*. A similar conveyance to transfer the title to real estate must conform to the *lex loci*. The title of an assignee by involuntary proceedings is not recognized beyond the jurisdiction of the State wherein he is appointed. Lichtenstein v. Gillett, *supra*; Thompson v. Fry, *supra*; McClure v. Campbell, 71 Wis. 350. A foreign voluntary assignment, valid where executed, has been sustained as against all persons relative to personal property. McClure v. Campbell, 71 Wis. 350. But it is generally held that it is contrary to public policy to surrender property within the jurisdiction of the court to the control of a foreign

assignee and to compel citizens to go elsewhere to litigate their claims. Such property is subject to the claims of residents before such assignee can assert his rights. Woodward v. Brooks, 128 Ill. 222; Heyer v. Alexander, 108 Ill. 385; Frank v. Bobbitt (Mass.), Dec. 1, 1891, 29 N. E. Rep. 209; Henderson v. Schaas, 35 Ill. App. 155. It would seem, according to some decisions, that such citizens must institute proceedings to enforce their rights before such assignee has obtained possession of the property. Lichtenstein v. Gillett, *supra;* Reynolds v. Adden, 136 U. S. 348.

An assignment for the benefit of creditors, valid according to the law of the State where the debtor resides and where it is made, is binding upon all his creditors living in the same State. They cannot attach his property, included therein, situated in a foreign State, nor can they repudiate his discharge from further liability for his debts if the law of such State so provides, in case such debt was contracted subsequent to the passage of such law. Reynolds v. Adden, 136 U. S. 348; Lichtenstein v. Gillett, *supra.* All the debtor's foreign creditors are bound by such assignment if they accept the assignment by making themselves parties to the proceedings thereunder by proving up their claims and placing themselves under the jurisdiction of such State in such matter, and are barred from disputing the validity of it, or from taking any action for defeating its purpose as a transfer of all the property of the assignor. Thompson v. Fry, 51 Hun, 296; Carbee v. Mason, 64 N. H. 10; Norris v. Atkinson, 64 N. H. 87; Brown v. Smart, 69 Md. 320, 145 U. S. 454. It has, however, been held, that such assent, even of a creditor living where the assignment was made, binds him only as to the property of the debtor situated in that State. Moore v. Church, 70 Iowa, 208. Otherwise a foreign creditor is not bound by such insolvency proceedings. Regina Flour-mill Co. v. Holmes (Mass.), 30 N. E. Rep. 176; Thompson v. Fry, *supra.*

When a voluntary assignment for the benefit of creditors containing preferences to certain creditors, as allowed by the law of the domicile of the debtor, is presented by the assignee in asserting his right to property of the debtor situated in a State, where preferences are not allowed in assignments, other questions are presented. Such assignments are generally considered to be superior to the claims of creditors who are not residents of the State where such suit is pending. Green v. Wallis, N. J. Ch. 23 Atl. Rep. 498; Frank v. Bobbitt (Mass.), 29 N. E. Rep. 209; Long v. Girdwood, 150 Pa. St. 413, 24 Atl. Rep. 711. It has been held, that under the fourteenth amendment to the U. S. constitution citizens of each State have the same rights in every State court, and that since a resident creditor has a superior claim to the assignee of a non-resident, so has a citizen of another State. In this decision the question of preferences did not arise. Sturtevant v. Armsby Co. (N. H.), 23 Atl. Rep. 368. When the local law is silent as to the effect of foreign assignments with preferences, though such assignments are not allowed to be made in the State, the claim of the foreign assignee is allowed to prevail over that of the foreign attaching creditor. Egbert v. Baker, 58 Conn. 319. When the local law is broad enough to invalidate all assignments with preferences for the benefit of creditors wherever made, a foreign assignee can assert no title to personal property under his deed. Sheldon v. Blauvelt, 29 S. C. 453, 7 S. E. Rep. 593. Woodward v. Brooks, 128 Ill. 222. For the purposes of an assignment the *situs* of a debt is the residence of the creditor. First Nat. Bank v. Walker, 61 Conn. 154; Egbert v. Baker, 58 Conn. 319; O'Neill v. Nagle, 19 Abb. N. C. 399.

S. S. MERRILL.

CORRESPONDENCE.

To the Editor of the Central Law Journal:

FELLOW-SERVANT LAW OF MISSISSIPPI.

In your issue of March 17 in commenting upon an Alabama case you state that there prevails in Mississippi the common law rule "that the master is not liable for an injury inflicted on one servant through the negligence of a fellow-servant." Such may have been the rule at the time of the occurrence of the injury mentioned in that case. This rule, however, has been modified by section 3559, of the Code, 1892, which reads as follows: "Every employee of a railroad corporation shall have the same rights and remedies for an injury suffered by him from the act or omission of the corporation or its employers as are allowed by law to other persons not employees, where the injury resulted from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about a different piece of work, knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways or appliances, shall not be a defense to an action for an injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. Where death ensues from an injury to an employee the legal or personal representative of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, express or implied, made by an employee to waive the benefit of this section shall be null and void, and this section shall not deprive an employee of a corporation or his legal or personal representative of any right or remedy that he now has by law.

DABNEY MARSHALL.

Vicksburg, Miss.

To the Editor of the Central Law Journal:

In Vol. 36, number 2, CENTRAL LAW JOURNAL, under the notes of recent decisions, you say, "Under the common law rule in Alabama and Mississippi, the master is not liable for an injury inflicted on one servant, through the negligence of a fellow-servant. In Alabama this rule is modified by the Employees Liability Act; but no similar law is in force in Mississippi." I would call your attention to section 193, of the Constitution of Mississippi, 1892. Would also call your attention to the case of Welsh v. A. & V. Railway, decided at the last October Term, of our supreme court, which is no doubt reported in one of the Southern reporters. In this, you will see that the common law rule, as to fellow-servants on railroads does not apply where the employees are in a different department of labor, or on a different train. In the Welsh case above alluded to, Welsh was a brakeman on a switch engine, and the injury was caused by the defective apparatus used as a footboard. The defense, was that the engineer was a fellow-servant with the plaintiff, in the same mechanical department of labor and that it was engineer's duty to fix the same. The supreme court evidently took a contrary view, and held the engineer to be a vice-principal, so far as the machinery was concerned, and that the knowledge Welsh had of the defective machinery could not be set up successfully as a defense in view of the constitutional provision referred to.

J. M. GIBSON.

Vicksburg, Miss.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ACCIDENT INSURANCE—Pleading.—In an action on an accident insurance policy, where the petition does not allege compliance by the assured with the conditions of the policy, and no objection is made thereto, both the allegation and proof of such facts are waived, though necessary to entitle plaintiff to recover if not waived.—SUTHERLAND v. STANDARD LIFE & ACC. INS. CO., Iowa, 54 N. W. Rep. 453.

2. ACTION—Venue.—Rev. St. art. 1198, allowing suit against two or more defendants to be brought in the county where any one of them resides, extends to one whose liability as guarantor, and for a portion only of a claim, is not of itself within the jurisdictional limit of the court; the claim in its entirety, however, being within the limit.—TURNER v. BROOKS, Tex., 21 S. W. Rep. 404.

3. ADMINISTRATION — Allowance to Widow.—Under Hill's Code, § 1127, making it the duty of the county court, on filing the inventory of an estate, to make an order setting apart for the widow all the property of the estate exempt from execution, the court may appoint a commissioner, with the consent of the widow, to make a selection, and, on approval of such selection, it becomes the act of the court; and if the widow is satisfied, and the selected property is exempt from execution, the administrator cannot complain.—MCATEE v. MCATEE, Oreg., 32 Pac. Rep. 297.

4. ADMINISTRATION—Distribution of Estate.—Where, in a proceeding by certain heirs against the administrator for a distribution of the estate, one of the heirs is not made a party to the proceeding, an order directing such distribution will be reversed, as such order, in that it is not binding upon the heir who is not made a party, affords no protection to the administrator for a subsequent demand upon by such heir.—MORRIS v. VIRDEN, Ark., 21 S. W. Rep. 223.

5. ADMIRALTY—Maritime Contracts.—A contract to procure insurance is not a maritime contract, enforceable in admiralty.—MARQUARDT v. FRENCH, U. S. D. C. (N. Y.), 53 Fed. Rep. 603.

6. ADMIRALTY — Seamen—Lien for Wages.—Plaintiff was engineer on a steam dredge chartered for work on a government contract. He was the highest officer on the dredge, and directed the firemen and any other hands aboard, but he had no authority to engage or dismiss hands or purchase supplies. His wages were paid at the office of the charterer in Charleston, and he received pay only for each day that the dredge was at work: Held, that he was not the "master" of the dredge, within the rule denying to masters a maritime lien for wages.—THE ATLANTIC, U. S. D. C. (S. Car.), 53 Fed. Rep. 607.

7. ADMIRALTY JURISDICTION—Statutory Liens.—The lien given by Acts Me. 1889, ch. 287, to a part owner of a vessel for debts contracted and advances made for certain purposes, not being of a maritime nature, cannot give jurisdiction to a federal court sitting in admiralty.—THE H. E. WILLARD, U. S. D. C. (Maine), 53 Fed. Rep. 599.

8. ADVERSE POSSESSION.—Where purchasers inclose a larger area of the vendor's land than that embraced in their deeds, possession of the entire tract by their grantees, who purchased with reference to the inclosure, with a claim of title as to all the land therein, and recognizing no other right, is adverse to the original vendor, though the deed to the adverse claimants purports to convey only the premises originally granted.—HAND v. SWANN, Tex., 21 S. W. Rep. 282.

9. ALTERATION IN NOTE.—An insertion in a note, without the consent of the maker, of the words "or bearer" after the name of the payee, and also words stating a place of payment, is a material alteration, and will avoid the note in the hands of *bona fide* purchasers before maturity, though there is nothing on the face of the note to indicate the alteration, and the added words are written in spaces left by the maker.—SIMMONS v. ATKINSON & LAMPTON CO., Miss., 12 South. Rep. 263.

10. ALTERATION OF NOTE.—Where, after the sealing and delivery of a bill, the payee presents it, without the maker's knowledge, to such maker's brother, who writes his name in the place where should appear the name of a witness, but he testifies that he was asked to indorse the note, and meant to do so, but by mistake wrote his name in the wrong place, the alteration will not avoid the instrument.—FISHER v. KING, Pa., 25 Atl. Rep. 1029.

11. APPEAL—Assignment of Errors.—Assignments of error stating merely that the court erred in overruling all of defendant's objections to evidence, and in sustaining all of plaintiff's objections, do not specify with reasonable certainty the grounds of error, as required by Hill's Code, § 537, and are, therefore, not reviewable.—HERBERT v. DUFUR, Oreg., 32 Pac. Rep. 302.

12. APPEAL—Weight of Evidence.—In an action to establish a trust in land in plaintiff's favor on the ground that it was purchased with her property by defendant, who took title in his own name, a finding of the lower court that no trust resulted, made on conflicting evidence as to whether plaintiff or defendant furnished the purchase money, will not be disturbed on appeal.—BUTLER v. SHUMAKER, Ariz., 32 Pac. Rep. 265.

13. APPEAL BOND.—Where the bond given on appeal from a justice's judgment does not comply with the

statute, and plaintiff has the appeal dismissed on that ground, he cannot sue on the bond, on failure to collect the judgment, since an action could be maintained on it, if at all, only as a common law bond, and it is not good, as such, because never agreed to or ratified by plaintiff.—GREGORY V. GOLDTHWAITE, Tex., 21 S. W. Rep. 413.

14. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Plaintiff sued to set aside an assignment for the benefit of creditors, alleging fraud by the assignor. The assignee demurred. The court sustained the demurrer, and ordered plaintiff to plead over, which he refused to do, and requested the court to render judgment against him for costs: Held, that on the neglect of the court to render such judgment, under Comp. St. 1887, div. 1, § 244, plaintiff might request it to do so, in order to obtain a final judgment, from which he could appeal, and such request did not render the judgment one by consent, from which no appeal lies.—STEVENSON V. MATTESON, Mont., 32 Pac. Rep. 291.

15. ASSIGNMENT FOR BENEFIT OF CREDITORS—Attachment.—In an attachment suit by creditors after defendants made an assignment for benefit of all their creditors, in which the father of one of defendants is preferred for a large amount, the statements of defendants, made to their creditors and others, in order to establish their credit, and in which said debt to defendant's father was not mentioned, are admissible in evidence, since they tend to cast doubt on the genuineness of such debt.—ENGLISH V. FRIEDMAN, Miss., 12 South. Rep. 252.

16. ASSIGNMENT OF BOND.—After assigning a bond for the payment of a sum of money, the assignor drew an order on the assignee, directing him to pay a specified sum to a third person: Held, that the acceptance of such order by the assignee, to be paid when in funds from the collection of the bond, did not operate as an assignment to the payee named in the order, but merely constituted the assignee her agent to pay her when in funds; and hence payment of the bond to the assignee will protect the person making the payment as against the payee named in the order.—COMMONWEALTH V. CUMMINS, Penn., 25 Atl. Rep. 996.

17. ATTACHMENT—Affidavit.—An affidavit for attachment is not defective because the notary before whom it was sworn to did not append to his signature to the jurat the name of the county for which he was appointed, if the caption of the affidavit contains the name of the county.—SMITH V. RUNNELLS, Mich., 54 N. W. Rep. 375.

18. ATTACHMENT — Contract.—The damages resulting from a breach of a contract to deliver cattle constitutes a "debt," for which attachment lies.—STIFF V. FISHER, Tex., 21 S. W. Rep. 291.

19. ATTORNEY AND CLIENT—Evidence.—In an action by an attorney for services rendered in a particular case, it is error to permit plaintiff, as a witness, to state a conversation with defendant at the time of his employment in a previous case, in which he related to defendant what the lawyers about town said as to his having trouble in settling with all the lawyers he ever had.—CROWELL V. TRAUX, Mich., 54 N. W. Rep. 384.

20. BOUNDARIES—Evidence.—In an action involving the location of a boundary line between two city lots, evidence that all the lots in the block are of uniform width, and that the boundary claimed by defendant, would render plaintiff's lot six feet narrower than any other lot in the block, sustains a verdict in plaintiff's favor.—GOLDSBOROUGH V. PIDDUCK, Iowa, 54 N. W. Rep. 431.

21. CARRIERS—Goods.—A rule of a railroad company not to receive goods that have been damaged while in the hands of other roads, unless it is indemnified against liability for the damage, is reasonable, and the company is not liable for delay where the goods of a shipper, which are not damaged, are "billed" by mistake to another person, whose whole shipment is refused because part of it is damaged.—MISSOURI PAC. R. CO. V. WEISSMAN, Tex., 21 S. W. Rep. 426.

22. CARRIERS — Goods — Damages.—In an action against a carrier for failure to transport plaintiff's museum in time for a certain exhibition, the measure of damages is the probable net profits plaintiff would have made.—YOAKUM V. DUNN, Tex., 21 S. W. Rep. 411.

23. CARRIERS—Passenger — Evidence.—In an action against a railroad company for death resulting from a defective track, where defendant took the burden of proof, and its witnesses testified that the track at the place of the accident and in that vicinity was in excellent repair, plaintiff may not only show the defective condition of the track at the place of the accident, but may show its condition several hundred feet on each side thereof as corroborative. — OHIO VAL. RY. CO. V. WATSON'S ADM'R, Ky., 21 S. W. Rep. 244.

24. CARRIERS—Passengers—Negligence.—The duty of a railroad to have its station platforms guarded and lighted so as to protect persons coming to the station to bid farewell to friends intending to leave on regular passenger trains does not extend to persons coming at an unusual hour with one who intends leaving on a freight in charge of stock, and who, although allowed the use of the waiting room, and allowed to load at the platform instead of in the yards, is not a passenger, except in a very limited sense.—CHICAGO, M. & ST. P. RY. CO., Wis., 54 N. W. Rep. 24.

25. CARRIERS OF PASSENGERS—Baggage—Damages.—The measure of a passenger's damages for a carrier's delay in forwarding her trunk is the value of the use of the property during the delay.—GULF, ETC. RY. CO. V. VANCIL, Tex., 21 S. W. Rep. 303.

26. CARRIERS OF PASSENGERS—Injury to Postal Clerk.—A United States railway postal clerk, who has finished his regular run, and is on a train returning home, riding free on the strength of his photograph commission, in accordance with the custom of the railroad company under its contract to carry the mails, is a passenger, and entitled to damages resulting from the negligence of the railroad's employees whether he is riding in a passenger car or is in the postal car assisting his fellow clerks in handling the mails.—CLEVELAND, C. C. & ST. L. RY. CO. V. KETCHAM, Ind., 33 N. E. Rep. 116.

27. CHATTEL MORTGAGE—Estoppel.—Defendant took a chattel mortgage without notice, actual or constructive, that plaintiff had a prior mortgage on the same property. Afterwards she took a second mortgage on the same and other property, which second mortgage recited that it was given "as additional security," and that the property was subject to defendant's first mortgage, and also to plaintiff's mortgage: Held, that taking the second mortgage did not estop defendant from asserting title under her first mortgage, as against plaintiff. — CITY BANK OF BOONE V. RADTKE, Iowa, 54 N. W. Rep. 435.

28. CHATTEL MORTGAGE—Record — Fraud.—A merchant gave a bank a chattel mortgage on his stock of goods, which mortgage, by agreement of the parties, was not recorded. Afterwards he gave the bank a bill of sale of the goods, in satisfaction of the mortgage, and the bank took possession: Held, that the bank's title was subject to the lien of creditors who, without notice of the mortgage, had sold the merchant goods after the mortgage was given; since, as to them, the agreement not to record the mortgage rendered the entire transaction fraudulent.—GOLL & FRANK CO. V. MILLER, Iowa, 54 N. W. Rep. 443.

29. CIVIL RIGHTS — Carriers of Passengers.—Const. U. S. amend. 14, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," and Const. Mo. 1865, art. 1, § 3, which provides that "no person can, on account of color, be subjected in law to any other restraints or disqualifications in regard to any personal rights than such as are laid upon others under like circumstances," are

not violated by a railroad regulation that forbids negroes to travel in the same cars with white people, where the railroad company provides equally good cars for the negroes as for the white.—CHILTON V. ST. LOUIS & I. M. RY. CO., Mo., 21 S. W. Rep. 458.

30. CONFLICT OF LAWS—Rights of Receiver.—Where, under voluntary proceedings for the dissolution of a corporation of another State, a receiver is appointed by a court of that State, and the creditors enjoined from prosecuting actions against the corporation, the courts of this State will recognize the rights of the receiver to a claim of the corporation against a citizen of this, in preference to a creditor of the corporation, a citizen of the same State as the corporation, who brings an action against the corporation, and garnishes the creditor.—GILMAN V. KETCHAM, Wis., 54 N. W. Rep. 395.

31. CONSTITUTIONAL LAW—District Courts—Jurisdiction.—Under Const. art. 5, § 8, as amended in 1891, which, after empowering the district court to issue writs of *mandamus*, injunction, etc., declares that it "shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this constitution," that court has jurisdiction of an action to restrain the commissioner of the general land office from re-establishing the boundary of a county.—KAUFMAN COUNTY V. MCGAUGHEY, Tex., 21 S. W. Rep. 261.

32. CONSTITUTIONAL LAW—State Legislature.—Const. art. 5, § 33, providing that "no money shall be paid out of the treasury except upon appropriations made by law," does not affect the right of the legislature to grant continuing appropriations,— *i. e.* those the payment of which is to be continued beyond the next session of the legislature,—but the power of the legislature, except as otherwise restricted by the constitution, is plenary over the entire matter of appropriations, but such power must be exercised subject to the provisions of Const. art. 10, § 16, prohibiting appropriations in excess of the revenue.—IN RE CONTINUING APPROPRIATIONS, Colo., 32 Pac. Rep. 272.

33. CONSTITUTIONAL LAW—Unverified Information.—Though Sess. Laws 1889, p. 101, § 1, gives the county court original jurisdiction of misdemeanors, on information by the district attorney, an unverified information should be quashed, as in violation of Const. art. 2, § 7, which provides that no warrant to seize any person shall issue without probable cause, supported by oath or affirmation, reduced to writing.—LUSTIG V. PEOPLE, Colo., 32 Pac. Rep. 275.

34. CONTEMPT—Affidavit.—In a proceeding for a constructive contempt, the affidavit on which the proceeding is based is jurisdictional, and all the facts showing that the case is one over which the court has jurisdiction must be made to affirmatively appear by the affidavit.—STATE V. SWEETLAND, S. Dak., 54 N. W. Rep. 415.

35. CONTEMPTS—Civil and Criminal.—Contempts of court are of two kinds,—civil and criminal. When a party refuses to do something which he is ordered to do for the benefit or advantage of the opposite party, such as disobedience of an order of court for the payment of costs, or non-performance of the awards of arbitrators, the order is looked upon as a civil execution for the benefit of the injured party, although the proceedings are carried on in the shape of a criminal process; and he stands committed until he complies with the order. The order in such case is not punitive, but coercive.—STATE V. KNIGHT, S. Dak., 54 N. W. Rep. 412.

36. CONTRACT—Action for Services.—In an action for medical services, an instruction that if defendant's attending physician called in plaintiff for consultation as to defendant's condition, and that plaintiff, at such physician's request, visited defendant, defendant would be liable for the reasonable value of his services, is erroneous, where there is no allegation in the petition that plaintiff was called in for consultation by defendant's attending physician, and where there is no evidence in support of such fact.—SCHRADER V. HOOVER, Iowa, 54 N. W. Rep. 463.

37. CONTRACT—Consideration.—An agreement by a person who has performed labor for a contractor, in the erection of a building, to sign a release of the contractor from personal liability, in consideration that the owner will pay the former a past due note, is *nudum pactum*.—MCNUTT V. LONEY, Penn., 25 Atl. Rep. 1088.

38. CONTRACT—Construction.—In order that a prospectus of a proposed publication may become a part of the contract of a subscriber for the work to be published, it must appear that the contents of the prospectus were communicated to him, so that he may be supposed to have been influenced thereby.—TICHNOR V. HART, Minn., 54 N. W. Rep. 369.

39. CONTRACT — Construction — Oral Agreement.—A written contract provided that defendants have engaged plaintiff as traveling salesman, at a fixed salary per month, from March 1, 1889; plaintiff to sell goods to from $35,000 to $40,000 per annum. It was subsequently agreed orally that defendants should retain one-fourth of plaintiff's salary as a guaranty that he would sell the specified amount during the year: Held, that the contract constituted an employment for a year, and not by the month.—STRAUSS V. GROSS, Tex., 21 S. W. Rep. 305.

40. CONTRACT—Parol Evidence.—Where a contract has been interpreted on an appeal to this court, such contract is not ambiguous or uncertain, and on a new trial parol evidence cannot be introduced to show the intention of the parties, under Civil Code, § 1649, and Code Civil Proc. § 1864, authorizing parol evidence in cases of doubtful and ambiguous contracts; for these sections do not apply when the courts are able to declare the true intent of the parties.—SAN DIEGO FLUME CO. V. CHASE, Cal., 32 Pac. Rep. 245.

41. CONTRACT — Parol Evidence.—Where a written agreement relates to several different transactions, and it appears on its face to be complete, oral testimony to show that the writing was not in full settlement of all matters between the parties, but that the agreement was partly verbal, is not admissible, unless it further appears that the appearance of completeness results from fraud, accident, or mistake.—WILLIS V. BYARS, Tex., 21 S. W. Rep. 320.

42. CORPORATION — Conversion of Stock.—Where a corporation, through innocent mistake, permits a transfer on its books of shares of stock under a forged power of attorney, the owner's measure of damages is the value of the stock at the time of the transfer, with interest from the date of the verdict, and not the highest price reached by the stock between the date of the conversion and the time of bringing suit, with the dividends since declared.—PENNSYLVANIA CO. FOR INSURANCE ON LIVES & GRANTING ANNUITIES V. PHILADELPHIA, G. & N. R. CO., Penn., 25 Atl. Rep. 1043.

43. CORPORATIONS — Dissolution — Stock.—In a proceeding by stockholders to dissolve a corporation, the testimony of petitioners as to the amount of stock held by them is admissible, and the stock book need not be produced for that purpose.—WOLFE V. UNDERWOOD, Ala., 12 South. Rep. 234.

44. CORPORATIONS — Officers. — The president and manager of a corporation who pays the interest coupons due on bonds to the holders (who suppose the payment was by the corporation) cannot, after the corporation becomes insolvent, hold such coupons as liens on the corporate property, as superior to creditors, on the claim that the payment was by himself instead of the corporation, where the directors of the corporation had no knowledge of his advancing such money, and no credit was given him therefor on the books of the corporation.—LLOYD V. WAGNER, Ky., 21 S. W. Rep. 334.

45. CORPORATION—Pledge of Stock.—Plaintiff loaned money on a stock of goods. The goods, which were named as collateral, were to remain in possession of the debtor, who was to conduct the business as plaint-

iff's agent, until the indebtedness should be paid. Subsequently the goods were contributed, with plaintiff's consent, to the capital of a newly-formed corporation. Plaintiff having released his claim on the goods, received a portion of the capital stock of such corporation, indorsed in blank as collateral, for his indebtedness. The stock was never transferred on the books, but remained in the name of the debtor: Held, that plaintiff was not a stockholder, but a creditor; and a confession of judgment in his favor, therefore, was not illegal.—PROUTY v. PROUTY & BARR BOOT & SHOE CO., Pa., 25 Atl. Rep. 1001.

46. CORPORATIONS—Rights of Stockholders.—Stockholders of a corporation have a right to have the property of the corporation applied and used exclusively for the purposes specified in its charter, and any attempt by its managers to appropriate it to any other purpose is a violation of the rights of the stockholders.—RABE v. DUNLAP, N. J., 25 Atl. Rep. 959.

47. CORPORATIONS—Stock.—Where a corporation is authorized to hold stock in another corporation, it is entitled to vote such stock.—DAVIS v. UNITED STATES ELECTRIC POWER & LIGHT CO. OF BALTIMORE CITY, Md., 25 Atl. Rep. 982.

48. CORPORATIONS — Stockholders.—W and T were conducting a private bank at L, and on November 1, 1887, organized a corporation with an alleged capital of $50,000, of which they retained a controlling interest. They turned over the deposits and assets of the private bank to the new corporation, and notes were taken from a number of the stockholders for the amount of their stock: Held, that the stockholders were liable for the unpaid stock held by each, and for a sum equal to the shares so held by each for all liabilities of the bank accruing while he was a stockholder.—PORTER v. SHERMAN COUNTY BANKING CO., Neb., 54 N. W. Rep. 424.

49. CORPORATIONS — Stockholders — Limitation.—As a general rule, the creditors' right of action against the stockholders of a corporation on their statutory liability is not complete, so as to set the statute of limitations running, until judgment has been recovered against the corporation, and execution against it has been returned unsatisfied.—YOUNGLOVE v. KELLY ISLAND LIME CO., Ohio, 33 N. E. Rep. 234.

50. CORPORATIONS — Stockholder — Limitations.—To set the statute of limitations running against a creditor of a corporation, and in favor of the stockholders, on their statutory liability, it is necessary that the creditor's claim be reduced to judgment, and execution returned unsatisfied, or that the property of the corporation, by some legal proceeding, be put in process of application to the payment of its debts, so as to render judgment and process against it impossible or nugatory, as where the corporation has been dissolved, or thrown into bankruptcy, or placed in the hands of a receiver, or has made an assignment of its property for the benefit of its creditors.—BRONSON v. SCHNEIDER, Ohio, 33 N. E. Rep. 233.

51. CORPORATION—Suit.—An objection that defendant corporation is not entitled to defend the suit because it has not complied with Civil Code, § 299, requiring that every corporation shall file a copy of its articles of incorporation in every county where it holds property, and on failing to do so it shall not maintain or defend any proceeding in relation to such property, will be deemed waived unless taken during the trial.—LABORY v. LOS ANGELES ORPHAN ASYLUM, Cal., 32 Pac. Rep. 231.

52. CORPORATIONS—Validity of Incorporation.—In an action by the State to forfeit a corporation's charter for want of substantial compliance with the statutory requirements in its formation, the corporation is a necessary party defendant, and making it such is not an admission of its corporate character, so as to preclude the State from questioning its rights to corporate existence.—PEOPLE v. MONTECITO WATER CO., Cal., 32 Pac. Rep. 236.

53. COUNTIES—Bridges.—The act authorizing a toll bridge connecting plaintiff and defendant counties provided that the counties might purchase the bridge, and make it a free bridge. This was done, each county court paying half the purchase price; but, as the superstructure of the bridge was in unsafe condition, it was rebuilt by plaintiff county, the court of defendant county refusing to join in the expense, on the ground that its financial condition would not warrant such steps: Held, that an action to compel contribution from defendant county could not be maintained.—JEFFERSON COUNTY v. ST. LOUIS COUNTY, Mo., 21 S. W. Rep. 217.

54. COUNTIES — Publication of Tax List.—Under St. 1891, ch. 216, § 25, subd. 23, providing that the board of supervisors shall fix the price of all county advertising, and each county officer shall procure such advertising, at a price no greater than is so fixed, *mandamus* will not lie to compel a tax collector to publish a delinquent tax list in a certain newspaper, even though such newspaper has tendered the lowest bid for such publication.—JOURNAL PUB. CO. v. WHITNEY, Cal., 32 Pac. Rep. 237.

55. COUNTY COURT—Jurisdiction.—Gen. St. ch. 92, art. 7, § 2, which empowers the county court to correct assessments improperly charging any person with any tax or county levy, and which provides that a certificate of the fact by the clerk, if delivered to the sheriff, shall exonerate the person from the payment of so much as may be decided to be wrongful, invests the county court with authority, not merely to examine the tax books and correct errors of the assessor as to valuation, but also to relieve any person from any tax or county levy for which he is not legally bound.—LOUISVILLE WATER CO. v. CLARK, Ky., 21 S. W. Rep. 246.

56. COURTS—Validity of Judgment.—Where the records of the proceedings of the supreme court show that a certain person was "sitting,by consent of counsel" as special judge of such court, in the absence of one of the commissioned judges thereof, such record cannot be collaterally attacked on petition for *supersedeas* in a case decided by such court while thus constituted, but is a verity.—RADFORD TRUST CO. v. EAST TENNESSEE LUMBER CO., Tenn., 21 S. W. Rep. 329.

57. CRIMINAL EVIDENCE—Assault.—On the trial of a person for assaulting his wife with intent to kill her, where the evidence showed that the assault was made because defendant's wife refused to live with him, and the defense was that defendant at the time of the assault was temporarily insane from the recent use of intoxicating liquor, evidence of a previous assault, ill treatment, and threats is admissible both to show malice and the condition of defendant's mind.—HALL v. STATE, Tex., 21 S. W. Rep. 368.

58. CRIMINAL EVIDENCE — Confessions. — An officer met defendant, and charged him with larceny, and stated that there was no use to deny it. He also told defendant he was friendly to him, and would try to get him out of it. Defendant thereupon confessed, and told him, if he would let him go, he would leave the State. The officer then took him before the city marshal, and defendant repeated his confession, believing that he was among friends. The officer claimed that he told defendant he was not under arrest at the time he made the confession to him. Held, that such confession was not voluntary, and not admissible.—CLAYTON v. STATE, Tex., 21 S. W. Rep. 255.

59. CRIMINAL EVIDENCE — Homicide.—On a trial for murder, where a witness testified that defendant, within a few minutes after the homicide, made a statement to him as to the manner of the killing, in which he claimed it to have been accidental, it was proper for the State to show that such witness stated to the district attorney on the morning of the trial that the statement made by defendant was on the day following the homicide, though the State had made such witness its own.—DAVIS v. STATE, Tex., 21 S. W. Rep. 369.

60. CRIMINAL LAW—Assault with Intent to Kill.—

Where, on a trial for an assault with intent to kill, it appeared that defendant intruded himself into a dance, armed with a deadly weapon, forbidden by statute to be carried into such places, and with it seriously wounded an unoffending guest, with whom he had no altercation, it is not error for the court to refuse to charge with reference to self-defense and aggravated assault.—ESCAJEDA v. STATE, Tex., 21 S. W. Rep. 361.

61. CRIMINAL LAW — Circumstantial Evidence.—Where, in addition to circumstantial evidence, the confession of accused that he committed the crime with which he is charged was proved, the court properly refused a charge on the law of circumstantial evidence, such charge being necessary only when the guilt of a defendant is dependent "wholly" on circumstantial evidence.—WILSON v. STATE, Tex., 21 S. W. Rep. 361.

62. CRIMINAL LAW—Enticing away Laborers.—A cropper, who is hired to work land for a part of the crop, is a "laborer," within Acts 1890, ch. 56, by which it is made unlawful to induce a laborer who has contracted with another for a specified time to leave his employer before his contract has expired, without the consent of the employer.—WARD v. STATE, Miss., 12 South. Rep. 249.

63. CRIMINAL LAW — Former Jeopardy.—Though for the purpose of settling the question of venue, in cases of larceny, the fiction exists that a thief commits a new and distinct larceny when he carrys the stolen property into or through counties other than that of the original taking, there can be but one conviction for the taking; and where a person steals two head of cattle from different owners, and drives them together into another county, he has not thereby committed a fresh theft, either in fact or law, and a prosecution and conviction in the county into which the cattle are driven, for the theft of one of the cattle, is therefore no bar to a prosecution for the theft of the other.—HARRINGTON v. STATE, Tex., 21 S. W. Rep. 356.

64. CRIMINAL LAW — Former Conviction—Municipal Ordinance.—Defendant was tried and convicted before the mayor's court for violation of a city ordinance, the maximum and minimum penalties being considerably less than the maximum and minimum penalties provided by general statute for the same offense. Defendant was thereafter prosecuted in the county court for the same offense, and pleaded former conviction. This plea was struck out on the ground that the mayor's court had no jurisdiction, and defendant convicted: Held that, the city ordinance being in conflict with the general statute, the proceeding in the mayor's court was a nullity.—MCLAIN v. STATE, Tex., 21 S. W. Rep. 365.

65. CRIMINAL LAW — Gaming—"Craps."—"Craps" is not a banking game, within the meaning of Pen. Code, art. 358, providing a penalty for any person who shall keep or exhibit for gaming any gaming table or bank of any name or description whatever.—BELL v. STATE, Tex., 21 S. W. Rep. 366.

66. CRIMINAL LAW—Homicide.—On a trial for homicide, where self-defense is relied on, the mere fact that a person is assaulted with a deadly weapon does not necessarily relieve him of the duty of retreat; it being his duty to do so rather than slay his assailant, if he can do so without increasing his peril, or placing himself at a disadvantage.—MCDANIEL v. STATE, Ala., 12 South. Rep. 241.

67. CRIMINAL LAW — Homicide—Deputy Sheriffs.—Where such an officer, who is known in the community as a deputy sheriff, summons a bystander to assist him in the arrest of an offender, the bystander will be justified in so doing, and, if the offender shoots him while making the arrest in an orderly manner, it is murder.—WEATHERFORD v. STATE, Tex., 21 S. W. Rep. 251.

68. CRIMINAL LAW—Jurors—Constitutional Law.—Rev. St. 1889, Append. art. 21, § 9, which disqualifies persons from serving as jurors in the city of St. Louis, in criminal cases, because of their inability to read and write the English language, is not in conflict with Const. art. 2, § 28, which guaranties the right of trial by jury, as this provision does not deprive the legislature of the power to prescribe the qualifications of jurors.—STATE v. WELSOR, Mo., 21 S. W. Rep. 443.

69. CRIMINAL LAW — Murder — Accomplice.—The district court of a county in which a murder is committed has jurisdiction to try an accomplice, though all the acts constituting defendant such accomplice were committed in another county.—CARLISLE v. STATE, Tex., 21 S. W. Rep. 358.

70. CRIMINAL LAW—Perjury—Instructions.—It is essential that the jury be instructed that a conviction for false swearing cannot be had except upon the testimony of two credible witnesses, or one credible witness corroborated by other evidence as to the falsity of defendant's statement under oath.—AGUIRRE v. STATE, Tex., 21 S. W. Rep. 256.

71. CRIMINAL LAW—Recognizance on Appeal.—Laws 1892, p. 39, § 33, provides that "the court of criminal appeals shall not entertain jurisdiction of any case in which a recognizance is required by law unless such recognizance shall comply substantially with the form" prescribed by law: Held that, where the offense charged in the indictment is not one *eo nomine*, and the recognizance does not state its essential elements, the appeal will be dismissed.—JOHNSON v. STATE, Tex., 21 S. W. Rep. 371.

72. CRIMINAL LAW—Recognizance on Appeal.—Since the court of appeals is, by the act of 1892, succeeded, as to its criminal jurisdiction, by the court of criminal appeals, a recognizance on appeal in a criminal cause, after the passage of this act, binding the appellant to "abide the judgment of the court of appeals," is not a legal obligation, in that there is no such court as the court of appeals; and the appeal will, on motion, be dismissed.—NEUBAUER v. STATE, Tex., 21 S. W. Rep. 363.

73. CRIMINAL PRACTICE — Assault.—An indictment charged that defendant, with a loaded pistol, with "malice aforethought, did shoot off at, against, and upon" one W, "then and there giving to" him, "in and upon the body of him, with the pistol aforesaid, one wound, with the intent then and there him, of his malice aforethought, to kill:" Held, that the indictment was sufficient to show an assault with a loaded pistol by defendant on the person named therein, with the intent to kill him.—STATE v. MAGUIRE, Mo., 21 S. W. Rep. 212.

74. CRIMINAL PRACTICE — Conspiracy to Rob.—On a trial for conspiracy to commit robbery, if the indictment alleges the possession of the property intended to have been stolen in one person, and the title in another, the State must prove both allegations.—WARD v. STATE, Tex., 21 S. W. Rep. 250.

75. CRIMINAL PRACTICE—Misnomer.—Where defendant has been indicted under the name of "John Myatt," and at the trial suggests that his name is "Marion Myatt," the failure of the court to substitute defendant's correct name in the indictment is reversible error, under Code Crim. Proc. art. 513, providing for such change.—MYATT v. STATE, Tex., 21 S. W. Rep. 256.

76. CRIMINAL PRACTICE—New Trial.—A motion for a new trial, in a criminal case, on the ground of newly-discovered evidence, is addressed to the discretion of the trial judge; and unless his discretion has been abused, or some rule of law violated, the appellate court will not interfere.—STATE v. CARLOS, S. Car., 16 S. E. Rep. 832.

77. CRIMINAL TRIAL—Competency of Jurors.—Under Pen. Code 1879, art. 609, which provides that the punishment for murder in the first degree shall be death or imprisonment for life, it is the duty of the court to see that a jury is organized which will be willing to assess either penalty, as the facts and circumstances should warrant; and it may on its own motion, excuse jurors

who, on their *voir dire*, state that they have conscientious scruples against the infliction of the death penalty.—GONZALES V. STATE, Tex., 21 S. W. Rep. 253.

78. DECEIT — False Representations.—A grantor is liable in damages to his grantee, where the latter is induced to purchase by fraudulent representations of the grantor as to his title, and the grantor covenants to warrant against all persons claiming through him, where failure of title in the grantee was not by reason of any one claiming through the grantor, but because the grantor had no valid title.—SAGUINN V. SIEDENTOPF, Iowa, 54 N. W. Rep. 430.

79. DEDICATION—What Constitutes.—In an action to quiet title to a strip of land, it appeared that plaintiff company filed for record a map of its land, platted as a cemetery, on which map the strip in question, 40 feet wide along the west side of the tract, was left blank, with an entrance indicated therefrom into the cemetery. Subsequently, in cutting the land up into cemetery lots, the company left another strip, 20 feet wide, adjoining the former strip, and the whole was known as "E Avenue," which was used by the public for three years without objection: Held, that the facts showed an intention to dedicate the strip to the public for street purposes.—LOS ANGELES CEMETERY ASS'N V. CITY OF LOS ANGELES, Cal., 32 Pac. Rep. 240.

80. DEED—Consideration—Marriage.—A conveyance by the owner of mortgaged premises, in consideration of marriage and money received, of his interest in the premises, to his intended wife, is valid.—KLAUBER V. VIGNERON, Cal., 32 Pac. Rep. 248.

81. DEED—Escrow — Delivery.—Where a mortgage, perfect on its face, and bearing no evidence that the mortgagor's wife is to join in it, has been delivered by the mortgagor to the mortgagee, parol evidence is not admissible to show that it was delivered as an escrow, to become operative only on condition that the mortgagor's wife should join in it, since a deed can never be an escrow if delivered to the grantee himself.—EAST TEXAS FIRE INS. CO. V. CLARKE, Tex., 21 S. W. Rep. 277.

§ 82. DEED—Estoppel to Dispute or Assert Title.—One who purchases land and takes a deed cannot, in an action to recover the land by another, claiming under a prior deed from the same person, defeat the rule of common source of title by disclaiming title under the deed, and showing an outstanding title in another, but he must be held to admit the common grantor's title.—DYCUS V. HART, Tex., 21 S. W. Rep. 299.

83. DEEDS—Evidence.—Proof of a deceased officer's signature to the acknowledgment of a deed offered as an ancient instrument, that the grantor was at the time in the same county, and that the conveyance had been obtained by those claiming thereunder from one who had probably been their ancestor's administrator, is sufficient to raise a presumption of genuineness although there is no proof of possession under or referable to the deed.—WILLIAMS V. HARDIE, Tex., 21 S. W. Rep. 267.

84. DEED — Evidence — Execution. — The rule announced in Sayles' Civil St. art. 2257, that a duly recorded instrument may be put in evidence without proof of execution, unless attacked as a forgery, does not require proof of an instrument executed by virtue of a power, merely because the power is attacked, but only where the instrument itself is attacked.—MOSES V. DIBRELL, Tex., 21 S. W. Rep. 414.

85. DEED — Parol Evidence.—Where a deed from plaintiff to defendant city recited that the conveyance was for the purpose of widening a certain street, and that the city should "cause the removal and placing of my [the grantor's] fixtures upon the proper line, in accordance with the deed," parol evidence is not admissible to prove a verbal agreement on the part of the city to perform any other acts as a consideration of the deed.—WEAVER V. CITY OF GAINESVILLE, Tex., 21 S. W. Rep. 317.

86. DEED A MORTGAGE.—A deed of trust with a defeasance clause, and in form a conveyance of property to secure the payment of debts, with an equity of redemption reserved to the grantor, will be considered a mortgage, and not an assignment, on its appearing that this was the intent of the parties, even though the grantor was insolvent at the time of making the deed, and it conveyed nearly all his property, and nothing was left after the conveyance with which to redeem.—SMITH V. EMPIRE LUMBER CO., Ark., 21 S. W. Rep. 225.

87. DEED ON CONDITIONS—Breach.—A deed conveying land in consideration of the grantees' agreement to support the grantor during life, reserving to him a vendor's lien to secure the faithful performance of such agreement, with a right to live on the land during his life-time, and providing that on his death the land shall belong to the grantees, in fee-simple, if they have faithfully performed the agreement, creates an estate upon condition; and on breach of the condition the title revests in the grantor, and he may maintain trespass to try title for the recovery of the land, without first resorting to an action for the rescission or cancellation of the deed.—ALFORD V. ALFORD, Tex., 21 S. W. Rep. 283.

88. DEED TO WIFE.—Where the parties in trespass to try title derive title from a common grantor, one party cannot, in order to defeat a recovery of the other, deny the validity of the grantor's title. Where a deed by a husband to his wife contains general covenants of warranty, and recites a valuable consideration, the land conveyed vests in her as her separate property; it being unnecessary that the deed should contain a recital that the conveyance is intended for her separate use.—SWEARINGIN V. REED, Tex., 21 S. W. Rep. 383.

89. ELECTIONS—Contests.—When the board of county canvassers have completed their count, and executed and delivered the returns, their power ends; and any change or modification of such original returns in any particular involving any other than a mere clerical duty is beyond their power.—BELKNAP V. BOARD OF CANVASSERS OF IONIA COUNTY, Mich., 54 N. W. Rep. 376.

90. ELECTIONS—Town Council.—Where an election of a town council is invalid, the fact that the council in office declared it duly elected, and that such newly-elected council qualified for office and organized, does not make it a council *de facto*, so that a claim against the town, presented to it by a claimant who knew that their title to such office was in litigation, was sufficiently presented to bind the town. Pub. St. ch. 37, § 22, providing that all town officers hold their offices until their sucessors shall be "lawfully" qualified to act.—MURPHY V. MOIES, R. I., 25 Atl. Rep. 977.

91. ELECTIONS AND VOTERS—Recount of Ballots.—Under Laws 1887, Act No. 208, providing that on the filing with the board of canvassers of a petition by one aggrieved by the count of votes made by the inspectors of election, and his complying with certain other requisites, the board shall have power to cause the ballot boxes, to be brought before them, and to appoint a commitee, as therein provided, who shall open the ballot boxes, and make a recount thereof as to such candidates, the purpose for which the board shall have power to cause the boxes to be brought before them is not to ascertain whether a recount shall be made, but whether there was fraud or mistake in the original count.—MAY V. BOARD OF CANVASSERS OF WAYNE COUNTY, Mich., 54 N. W. Rep. 377.

92. ELECTION CONTEST — Evidence.—Evidence that the ballots cast at an election were sealed when the canvass was completed, and then delivered to the county clerk, and that they remained in his custody in the vault in his office till he delivered them to the referee in the election contest, when the seals were unbroken, is admissible to identify the ballots given to the referee as those cast at the election, though they might have been tampered with.—HUGHES V. HOLMAN, Oreg., 32 Pac. Rep. 298.

93. EMINENT DOMAIN.— Where defendant, through whose land a private road was surveyed, refused to

accept the compensation awarded, and the case was tried by a jury, he cannot complain of the jury's action in assessing damages on the ground that the evidence is insufficient to justify the verdict, as the burden of proving damages rests on defendant.—LOS ANGELES COUNTY v. REYES, Cal., 32 Pac. Rep. 233.

94. EMINENT DOMAIN — Foreign Corporation.—Rev. St. 1889, § 2568, provides that any railroad company organized and existing under the laws of any other State may extend and operate its railroad into and through Missouri, and shall possess all the rights, powers, and privileges, and be subject to all the duties and liabilities, of a corporation organized in Missouri: Held, in a proceeding by a foreign corporation to condemn land in Missouri for a right of way, that it was not essential to aver or prove that the corporation had built its line of railroad to the boundary line of the State in order to give the court jurisdiction of the subject-matters of such proceedings.—ST. LOUIS, ETC. CO. v. LEWRIGHT, Mo., 21 S. W. Rep. 210.

95. EMINENT DOMAIN—Railroad.—Where a railroad company, after surveying and locating a route, locates a second but afterwards abandons the second, and adopts the first, the appropriation of the property for the route dates from the adoption rather than from its location.—HAGNER v. PENNSYLVANIA S. V. R. CO., Pa., 25 Atl. Rep. 1082.

96. EMINENT DOMIAN—Trial by Jury.—Const. art. 12, § 4, provides that "the right of trial by jury shall be held inviolate in all claims for compensation, when, in the exercise of eminent domain, any incorporated company shall be interested either for or against the exercise of said rights." Rev. St. 1889, § 2738, provides that either party may have the assessment made by commissioners reviewed, "and the reviewal of such appraisement · · · shall, at the request of either party, be made by a jury:" Held, that a corporation exercising the right of eminent domain is entitled to a reassessment by a jury.—CHICAGO, ETC. RY. CO. v. MCGREW, Mo., 21 S. W. Rep. 201.

97, EQUITY — Assigned Claim — Reformation.—Where an assignment appears on its face to transfer but one claim, but it is contended that the subject-matter of the claim was based on two separate contracts, and that as to the part of the claim based as one of the contracts the assignment was procured by fraud, and void, defendant cannot, in an action at law on the assignment, plead and prove by parol that the assignment was good only as to a portion thereof, and void as to the balance, but relief must be sought in equity, where the contract may be reformed in accordance with the facts.—BIGELOW v. WILSON, Iowa, 54 N. W. Rep. 465.

98. EQUITY — Jurisdiction — Trespass—Tax.—If a tax collector seizes personal property to enforce a tax levied under an act that is unconstitutional, such seizure would be a trespass, for the redress for which there is ample remedy at law. A court of equity has no jurisdiction to restrain a trespass upon personal property, except in rare cases, where the property has some peculiar intrinsic value to the owner that could not be compensated in money.—ODLIN v. WOODRUFF, Fla., 12 South. Rep. 227.

99. EVIDENCE—Negligence—Degree of Care.—Plaintiff, while crossing a street, was injured, through the alleged negligence of an employee of defendant cable car company, who, it was claimed, so carelessly threw down a crow-bar he had been using that it struck plaintiff. Plaintiff did not cross at the regular crossing, because it was muddy, but was passing diagonally over the street: Held, that evidence that it was very unusual for women to cross the street at this point was properly admitted. Such evidence was not competent for the purpose of showing contributory negligence in plaintiff, for she had the right to cross the street at any point she saw fit, but was admissible to show that a greater degree of caution was required on her part than if she had crossed at the usual place.—HENRY v. GRAND AVE. RY. CO., Mo., 21 S. W. Rep. 214.

100. EXECUTION SALES—Bid by Officer.—Gen. St. ch. 38, art. 15, § 2, which provides that no officer shall bid for or buy any property which may be sold under execution by himself or deputy, applies only to bids or purchases for himself, and does not prohibit plaintiff in execution, who intends to be absent at the sale, from authorizing the officer to offer a specified amount in his behalf.—BRANNIN v. BROADUS, Ky., 21 S. W. Rep. 244.

101. EXEMPTIONS—Pleading.—The exemption laws of another State cannot be pleaded by a non-resident, since Code, § 3072, provides only that if the debtor is a "resident," and the head of a family, he may hold certain property.—LYON v. CALLOPY, Iowa, 54 N. W. Rep. 476.

102. FEDERAL COURTS — Appeal—Mandate.—It is too late to question the jurisdiction of the circuit court after the return of a mandate from the circuit court of appeals, and the circuit court has no discretion but to enter a decree pursuant to the directions of the mandate, and carry the same into effect. — BILLINGS v. ASPEN MINING & SMELTING CO., U. S. C. C. (Colo.), 53 Fed. Rep. 561.

103. FEDERAL COURTS—Circuit Court—Jurisdiction.—Under the provisions of the Washington Code, which, by Rev. St. § 914, operate as rules of practice in actions at law in the federal courts in that State, an allegation, in a complaint in ejectment in the United States circuit court, as to the value of the property in controversy, is material, and, when denied in the answer, raises an issue; and, consequently, to sustain a judgment for plaintiff, the court must, where the action is tried without a jury, specially find that the value exceeds $2,000. — GREENE v. CITY OF TACOMA, U. S. C. C. (Wash.), 53 Fed. Rep. 562.

104. FEDERAL COURTS—Receivers of National Banks.—The federal courts have jurisdiction of suits by receivers of national banks, to collect the assets thereof, without regard to the citizenship of the plaintiff.—FISHER v. YODER, U. S. C. C. (Pa.), 53 Fed. Rep. 565.

105. FRAUDS, STATUTE OF—Maritime Lien. — Where a purchaser of a steamboat paid full value therefor, free from all liens, a parol promise thereafter made by him to pay a claim which includes separate accounts for prior repairs against the boat, under the impression that such accounts were a valid lien, is enforceable only as to such accounts as were a lien when the promise was made; the promise as to the other accounts being a promise to pay the debt of another, and invalid.—REES v. JUTTE, Pa., 25 Atl. Rep. 998.

106. FRAUDULENT CONVEYANCE. — A deed fraudulent on its face, and void *in toto*, not being attacked or set aside, is good between the parties. — THORNBURG v. BOWEN, W. Va., 16 S. E. Rep. 825.

107. FRAUDULENT CONVEYANCE — Knowledge of Grantee. — W, with a view to defraud his creditors, and with a knowledge of such purpose by the husband of S, transferred his property to S for a reasonably adequate consideration, which transfer S, acting on the husband's advice, accepted: Held, that S was not chargeable with her husband's knowledge of W's purpose, unless actually brought home to her.—BRUEN v. DUNN, Iowa, 54 N. W. Rep. 468.

108. FRAUDULENT CONVEYANCE—Proof of Fraud.—On trial of the right to property transferred by the owner to claimant, and seized by the attachment creditors of such owner, a statement contained in claimant's petition in a former suit by him against such owner for an accounting, tending to show the alleged consideration for the transfer, supplemented by evidence of like purport by the owner's attorney therein, is not competent, as against the attachment creditors, who were not parties to that suit, to rebut the presumption of collusion between claimant and the owner. — HOWARD v. PARKS, Tex., 21 S. W. Rep. 269.

109. HIGHWAYS—Establishment.—Code 1851 provided for the appointment by the court of a commissioner to

examine into the expediency of a proposed road, and declared that the court should fix the time for the commencement of such examination, and that, if the commissioner reported against the road, "no further proceedings shall be had thereon:" Held, that the omission to fix a time for the commencement of the examination did not invalidate a proceeding for the establishment of a road. — LARSON v. FITZGERALD, Iowa, 54 N. W. Rep. 441.

110. HOMESTEAD — Divorce. — The owner of land, on which he lives with his family, does not lose his homestead therein by the fact that his wife has obtained a divorce from him, and has been awarded the custody of the children, where he continues to live on the land, and is not expressly relieved, by the decree of divorce, from the duty of supporting his children.—BIFFLE v. PULLMAN, Mo., 21 S. W. Rep. 450.

111. HUSBAND AND WIFE — Community Property. — Under the Washington statutes, denying to a husband alone the power to sell or incumber community real estate, but giving him the absolute disposition of community personal property, rents of community real estate are subject to execution for an individual debt of the husband.—LEVY v. BROWN, U. S. C. C. (Wash.), 53 Fed. Rep. 568.

112. HUSBAND AND WIFE — Conveyance Between.—A conveyance of land by a wife to her husband, which is void because not properly executed, is no defense to an action in equity, by the heirs of the wife, to recover the land from the husband's grantee, where the consideration for such conveyance was not paid.—BOHANNON v. TRAVIS, Ky., 21 S. W. Rep. 354.

113. HUSBAND AND WIFE — Separate Estate. — Under Rev. St. tit. 34, ch. 3, § 18, which gives married women over 21 years old exclusive control of their separate property, with power to convey or devise the same, and section 19, which gives them the same rights, as to property and contracts, as are possessed by men, a married woman may, by purchase, acquire personal or real property, and hold it as her separate estate, though section 17 provides that "all property acquired by either husband or wife during marriage, except that which is acquired by gift, devise, or descent, shall be deemed common property of the husband and wife, and during coverture may be disposed of by the husband alone;" the word "acquired," in this section, not being intended to include a purchase made by the wife with her separate estate. — LIEBES v. STEFFY, Ariz., 32 Pac. Rep. 261.

114. INJUNCTION—Practice. — An injunction restraining a sheriff from executing a void writ of possession, in doing which he would be merely a tresspasser, is not an injunction enjoining the execution of the judgment on which the writ of possession was issued, and need not be returned to the court whence the order of sale and writ of possession emanated. — REAGAN v. EVANS, Tex., 21 S. W. Rep. 427.

115. INSURANCE — Change of Interest — Change of Occupants — Stock of Goods — Delivery and Levy of Execution.—The delivery of an execution to an officer, followed by a levy thereof on a stock of goods, does not effect a "change in the interest or title" of the property, within the meaning of a condition of a fire insurance policy thereon, providing that it shall be void if any change take place in the interest, title, etc., whether by legal process or otherwise.—WALRADT v. PHOENIX INS. CO. OF HARTFORD, N. Y., 32 N. E. Rep. 1063.

116. INSURANCE—Conditions of Policy.—An advertisement and sale of insured property under a power contained in a mortgage is not a violation of a policy of insurance which provides that it shall be void on the entry of a decree of foreclosure of the insured property, since, though the foreclosure sale be regarded as equivalent to a decree of sale by a court of equity, such decree does not pass title until ratified by the court. — HANOVER FIRE INS. CO. OF CITY OF NEW YORK v. BROWN, Md., 25 Atl. Rep. 989.

117. INSURANCE—Mortgagee.—Where a policy of insurance is issued to one party and made payable to another "as his mortgage interest may appear," the assured has the right to enter into an appraisement of the loss according to the terms of the contract, without notice to the mortgagee, and without his approval.—CHANDOS v. AMERICAN FIRE INS. CO., OF PHILADELPHIA, Wis., 54 N. W. Rep. 390.

118. INSURANCE—Proofs of Loss.—Where, in an action on a fire insurance policy, it appeared that plaintiffs submitted proofs of loss to one E, who, as agent of defendant, made out the policy sued on, and there was no evidence offered by defendant to support its claim that no proof had been made to any of its duly-authorized agents, the presumption is that E, having been its agent at the time the policy was made out, continued to be its agent, and a delivery of the proofs to E was a delivery to defendant.—MCCULLOUGH v. PHOENIX INS. CO., OF HARTFORD, Mo., 21 S. W. Rep, 207.

119. JUDGMENT — Collateral Attack.—Where a judgment is rendered by a court of limited powers and jurisdiction, it must affirmatively appear from the record that the court had jurisdiction of the person and the subject-matter.—MCGEHEE v. WILKINS, Fla., 12 South. Rep. 228.

120. JUDGMENT—Joint Defendants.—In an action on a joint debt, plaintiff, after joining all the debtors as defendants, so as to avoid a plea of non-joinder, cannot, by neglecting to take judgment against some of them in default, throw the burden of the common debt on one of them, against whom alone he enters judgment. MURTLAND v. FLOYD, Penn., 25 Atl. Rep. 1038.

121. JUDGMENT—Receivers.—The fact that the property of a judgment debtor is in the hands of a receiver, and in *custodia legis*, does not prevent a levy by execution upon the judgment.—WHEATON v. SPOONER, Minn., 54 N. W. Rep. 372.

122. JUDGMENT—Revival.—Plaintiffs moved to revive a judgment that was about to expire under the statute of limitations, so that it might be "a subsisting judgment" after such expiration, and, in accordance with such motion, it was adjudged that it be renewed and revived, and "be docketed anew, as though considered in this court this day, and that execution may issue to collect the same, as thongh said judgment had this day been rendered and entered in this court:" Held, that the judgment was a nullity, the proceeding being to obtain a judgment on the former one on a mere motion, which Rev. St. § 2916, prescribes must be done by an action at law, on leave of the court.—INGRAHAM v. CHAMPION, Wis., 54 N. W. Rep. 398.

123. JUDGMENT — Satisfaction.—A satisfaction of a judgment entered by plaintiff's attorney, who received the money due on the judgment, and paid it over to plaintiff's supposed agent, will not be striken off several years later, after the death of the attorney, the flight of the supposed agent (who retained the money) and the execution of a mortgage on the property on the faith of the satisfaction of the judgment, where there is some evidence that the person to whom the money was paid was in act plaintiff's agent.—MILLER v. PRESTON, Penn., 25 Atl. Rep. 1041.

124. JUSTICES OF THE PEACE—Jurisdiction.—A justice of the peace has no jurisdiction to sit as a trial court in a criminal case where the statute creating the offense provides that the punishment may be both a fine and imprisonment. In such case the justice can proceed only as an examining magistrate.—STATE v. YATES, Neb., 54 N. W. Rep. 429.

125. LANDLORD AND TENANT—Covenant —Damages.—In an action by a lessee against his lessor for breach of covenant for quiet enjoyment of land used as a pasture, where the lease provided that defendant lessor should pay all loss in case of sale of the land during the term, plaintiff may prove, as special damages, the extra expense and loss resulting from a temporary holding of the lessor's cattle on the commons pending a diligent effort to secure another pasture.—BUCK v. MORROW, Tex., 21 S. W. Rep. 398.

126. LANDLORD'S LIEN—Purchase for Value.—A purchase for value from a tenant, of goods on leased premises (except agricultural products) before distress for rent, gives a good title against the landlord, even though the purchaser knew that there was rent due, for the payment of which the landlord looked to the goods.—RICHARDSON V. MCLAURIN, Miss. 12 South. Rep. 264.

127. LEASE—Parol—Consideration.—Plaintiff leased a farm to defendant, by written lease, at a rent of 16 bushels of corn per acre. The season being unfavorable, it was discovered that the land would probably not yield that much. The parties then agreed orally that the rent should be one-half the crop: Held, that the agreement rested upon a sufficient consideration, and was binding.—RAYMOND V. KRAUSKOPF, Iowa, 54 N. W. Rep. 432.

128. LIBEL OF PUBLIC OFFICER — Justification.—A public officer on duty is amenable to public criticism in the newspapers without liability for libel, where there is a probable cause for the criticism, and no proof of express malice, even though the published statements are not strictly true.—JACKSON V. PITTSBERG TIMES, Penn., 25 Atl. Rep. 613.

129. LIENS—"Raw Material."—Under Code, §§ 189-193 inclusive, providing that if any corporation carrying on any business in the county of A shall, for 30 days, fail to pay the furnishers of any raw material used in such business, it shall be liable to a receivership of its affairs, and such claims shall have priority over all liens on the real estate of the party in default, except mechanics' liens, the words "raw material" include coal.—HICKS V. CONSOLIDATION COAL CO., Md., 25 Atl. Rep. 979.

130. LIFE INSURANCE — Surrender—Mistake.—A creditor carrying a $6,000 policy of life insurance upon the life of a debtor, in order to be relieved of the burden of further premiums, surrender the same for a paid-up policy for $2,500, under the rules of the company, subsequent to the death of the insured, both parties being ignorant of such death: Held, that as the surrender was not by way of compromise, but under a mutual mistake of fact, supposed to be undoubted, equity would grant relief by reinstating the policy holder to her rights under the surrendered policy. — RIEGEL V. AMERICAN LIFE INS. CO., Penn., 25 Atl. Rep. 1070.

131. LIMITATIONS.—The statute of limitations does not run against a legatee prior to the final settlement of the estate.—PEEBLES V. ACKER, Miss., 12 South. Rep. 248.

132. LIVERY STABLE KEEPERS—Warranty of Horse.—A liveryman who lets a horse does not warrant that it is free from defects which he does not know of, and could not have discovered by the exercise of due care; and, where a hirer is injured through such defects, the liveryman is not liable.—COPELAND V. DRAPER, Mass., 32 N. E. Rep. 944.

133. MANDAMUS—Chancery Clerk's Bond.—Code, § 405, provides that "the bond of the chancery clerk of each county shall be approved by the president of the board of supervisors of the county:" Held, that *mandamus* will not lie to compel such officer to approve such a bond.—SHOTWELL V. COVINGTON, Miss., 12 South. Rep. 260.

134. MASTER AND SERVANT—Contract of Employment.—Where defendant employed plaintiff for six months at a monthly hire, the employment terminated by its own terms at the end of the six months; and it was not necessary for defendant, in order to defeat a recovery on the contract beyond six months, to show that he discharged plaintiff, or by any express notice declared the contract terminated.—EWING V. JENSON, Ark., 21 S. W. Rep. 430.

135. MASTER AND SERVANT—Defective Car Couplings.—An instruction declaring a railroad company liable for injuries sustained by plaintiff in coupling cars, where defendant had been negligent in allowing the coupling to become defective, and plaintiff himself had been free from negligence, but omitting, as one of the conditions, the further fact that the defect must have caused the injury, is erroneous; and so, also, is an instruction stating the liability of defendant for negligent failure to inform its employee of extra hazards in connection with cars of unusual and more than ordinarily dangerous construction, but omitting, likewise, to state that such failure must have proximately caused the injury.—FORDYCE V. YARBROUGH, Tex., 21 S. W. Rep. 421.

136. MASTER AND SERVANT—Independent Contractors.—Where defendant let to a competent builder a contract for the removal from its premises of an old building, which could have been safely done in the exercise of due care, defendant is not liable for injuries to plaintiff's decedent by the falling of a wall, resulting from the contractor's negligence in the performance of the work.—ENGEL V. EUREKA CLUB, N. Y., 32 N. E. Rep. 1052.

137. MASTER AND SERVANT— Negligence.—In Mississippi a recovery cannot be had against a railroad company for an injury to an employee occurring prior to the adoption of the constitution of 1890, without showing negligence on the part of defendant, and that such negligence was the direct cause of the injury; evidence that there was negligence, and that the injury occurred, not being sufficient.—ILLINOIS CENT. R. CO. V. CATHY, Miss., 12 South. Rep. 253.

138. MASTER AND SERVANT.—Negligence.—The test of the liability of a principal or master for the torts of his agent or servant is whether the latter was at the time acting within the scope of his authority in the business of the principal or master, and not whether the act was done in accordance with his instructions. If such act be done within the scope of authority, and while the agent or servant is engaged in his employer's business, the latter is bound for it.—GREGORY'S ADM'R V. OHIO RIVER R. CO., W. Va., 16 S. E. Rep. 819.

139. MECHANIC'S LIEN—Pleading.—A lien account is sufficiently itemized which describes the windows, sash, and all classes of materials sold, with great particularity, except as to price, which appears at the foot of the account, showing the whole amount due at the price agreed upon, since the account contains sufficient information to enable any one to ascertain whether the price of materials was reasonable, and whether the materials entered into the construction of the building.—BARDWELL V. ANDERSON, Mont., 32 Pac. Rep. 285.

140. MECHANICS' LIEN—Stipulation.—A provision in a building contract that the owner will not be in any manner accountable for any loss or damage that may happen to the work, or for any of the materials, and that the contractor shall alone be responsible for all accidents, injuries, damages, or hurt to any person or property, does not prevent the contractor or a subcontractor from filing a lien.—NICE V. WALKER, Pa., 25 Atl. Rep. 1065.

141. MECHANIC'S LIEN—Time of Filing.—Under Code Civil Proc. § 1187, as amended by St. and Amend. 1887, p. 154, providing that every person, save the original contractor, claiming a lien, must, within 30 days after the "completion" of the building, file his lien, but that any "trival imperfection" in the construction shall not be deemed such a lack of completion as to prevent the filing of the lien, a lien filed before the doors of a house were hung, the plumbing finished, the closets and bath room completed, ventilators placed, and mouldings put in, is premature, and cannot be enforced, as such things are not "trival imperfections," but are necessary to be done to effect a "completion" of the building.—SCHALLERT-GANAHL LUMBEL CO. V. SHELDON, Cal., 32 Pac. Rep. 235.

142. MORTGAGE—Bona Fide Purchaser.—Where, after the filing of the complaint, and the issuance of a summons, in an action to enforce a vendor's lien, defendant in the action mortgages the land to B, who subsequently becomes its purchaser at foreclosure sale,

such purchase will not vest in B a title, as against a purchaser at an execution sale under a decree condemning the land to be sold to satisfy the vendor's lien.—BURLESON V. MCDERMOTT, Ark., 21 S. W. Rep. 222.

143. MORTGAGES—Bona Fide Holder.— One who, as security of negotiable notes, has executed a mortgage which he had the right and capacity to make, on property belonging to himself, by an act suggesting on its face no defect, duly recorded, and importing confession of judgment in favor of the mortgagee and any future holder of the note, cannot destroy its value in the hands of a subsequent holder by pleading secret equities between the original parties, created by his own fault, negligence, or imprudence, of which the subsequent holder had no notice and no means of information.— STATE NAT. BANK V. FLATHERS, La., 12 South. Rep. 243.

144. MORTGAGES—Foreclosure.—In an action to foreclose a mortgage, it appeared that different parcels of the mortgaged premises were conveyed to different persons at different times,—some by contract, with bond for titles, and afterwards consummated by warranty deed; some for full, and other for partial, money consideration; and one, in trust, in consideration of love and affection: Held, that the parcels should be subjected to the payment of the mortgage debt in the inverse order of their alienation.—WATSON V. NEAL, S. Car., 16 S. E. Rep. 833.

145. MORTGAGE— Foreclosure.—Where the owner of land mortgages it, and, after a judgment of foreclosure, leases it for five months, and receives the rent in advance, the purchaser at the foreclosure sale, after the time of redemption expires, can compel the tenant to pay again the rent accruing after the foreclosure sale, when his mortgage is recorded, since the case is not governed by Civil Code,§ 1111, providing that no tenant who, before notice of grant, shall have paid rent to the grantor, shall suffer any damage thereby, but by Code Civil Proc. § 707, providing that the purchaser from the date of the sale until redemption shall be entitled to receive the rents from the tenant in possession.—HARRIS V. FOSTER, Cal., 32 Pac. Rep. 246.

146. MORTGAGE—Liabilities of Lessee.—A party who leases property upon which there is a registered mortgage does so with full knowledge of the mortgage. Its registry is notice to him.—THOMPSON V. FLATHERS, La., 12 South. Rep. 245.

147. MORTGAGES— Redemption.— Where land is sold under a purchase-money mortgage, and the mortgagor is deprived of possession of the land before the time for redemption has expired, a tender by him, within the statutory period for redemption, of an amount of money which, with the rents of the land enjoyed by the purchaser under the sale, equals the purchase price of the land, with interest and costs, is sufficient.—WOOD V. HOLLAND, Ark., 21 S. W. Rep. 223.

148. MORTGAGE BY DEVISEE OF LANDS DEVISED.—A *bona fide* mortgage given by a devisee upon lands devised to him, and executed before suit brought against such devisee upon the debt of the testator, is an alienation *pro tanto* of the lands, and will take precedence over a judgment recovered against the devisee upon the debt of the testator.—MCMAHON V. SCHOONMAKER, N. J., 25 Atl. Rep. 946.

149. MUNICIPAL CORPORATIONS.—In an action against a city to enforce an executory contract, the petition must allege that the contract is authorized by law, as well as the existence of conditions made necessary by statutory or organic law to the execution thereof.—TEXAS WATER & GAS CO. V. CITY OF CLEBURNE, Tex., 21 S. W. Rep. 393.

150. MUNICIPAL CORPORATION—Obstruction of Street. —A city is not liable to a lot owner who is prevented from using, with his wagons, a street in front of his premises, by reason of the erection by the city of a platform and steps for the use of pedestrians, since such injury is one which he suffers in common with the general public.—HOBSON V. CITY OF PHILADELPHIA, Pa., 25 Atl Rep. 1046.

151. MUNICIPAL CORPORATION — Streets—Damages.— The fact that a street is raised above the grade of an intersecting street, so that vehicles can no longer pass from one to the other at that point, does not entitle a property holder owning adjoining, though separate, lots, on each street, to damages for the lots on the intersecting street, but only for the lots on the street abutting on the changed grade.—LAWRENCE V. CITY OF PHILADELPHIA, Pa., 25 Atl. Rep. 1079.

152. MUNICIPAL CORPORATION—Street Improvements. —In an action to enforce a street assessment it is no defense that the contract for the work contained a provision that there should be no assessment on the adjoining property for improving that part of the street occupied by a street-railway company, but that the company should pay therefor.— PERINE V. FORBUSH, Cal., 32 Pac. Rep. 226.

153. MUNICIPAL CORPORATIONS — Street Railways — Exclusive Franchise.— A city under a grant of exclusive power "to permit, allow, and regulate" the laying of tracks for street cars, has not power to grant for a term of years the exclusive right to occupy its streets with street railroads. — PARKHURST V. CITY OF SALEM, Oreg., 32 Pac. Rep. 304.

154. MUNICIPAL IMPROVEMENTS—Change of Grade.— The defendant city instituted proceedings to change the established grade of a street, in accordance with its charter, upon which certain mortgaged premises abutted. An assessment of the damages therefor was completed after a sale of the premises on foreclosure to the mortgagee for the full amount of the debt. No redemption was made from the foreclosure sale, and after the expiration of the time for redemption the mortgagee, who had thus become the owner, or his assignee, sued for the recovery of the damages awarded: Held, that he was entitled to recover.— MORITZ V. CITY OF ST. PAUL, Minn., 54 N. W. Rep. 370.

155. MUNICIPAL INDEBTEDNESS— Bonds— Taxation.— A petition of a tax-payer alleging that certain bonds were being issued by defendant city for an unlawful purpose, creating a debt, which could only be paid by revenues arising from taxation of the property holders; that such bonds were apparently for a lawful purpose; that plaintiff's property was in danger of being sold for taxes; and that the sale of such bonds, if negotiable, to innocent purchasers, would, by reason of their becoming a charge against the city, result in irreparable injury to plaintiff and others similarly situated,—shows such an interest in plaintiff as to entitle him to maintain an action to enjoin the issue of any such bonds or collection of taxes.—NALLE V. CITY OF AUSTIN, Tex., 21 S. W. Rep. 375.

156. NEGLIGENCE—Collision.—Persons in charge of a steamboat, across the path of which a rowboat has passed, but into which it is again brought by the occupant's losing an oar, are not guilty of negligence where immediately on discovering that control of the boat had been lost, they did everything possible to save the occupant from the danger.— SEKEREK V. JUTTE, Pa., 25 Atl. Rep. 994.

157. NEGLIGENCE—Electric Street Cars.—Where one, after dark, obstructs an electric street car track with his team while unloading his wagon, he is guilty of such negligence as will bar an action for the injuries to the team from a car, though it was more convenient to unload the wagon in that position than in any other.—WINTER V. FEDERAL ST. & P. V. PASS. RY. CO., Pa., 25 Atl. Rep. 1028.

158. NEGLIGENCE — Evidence. — Where a lot owner makes a contract for its excavation by persons whom he knows to be in the habit of blasting in violation of said ordinance, he is responsible for damage caused by their blasting on his lot without covering the rock, even though he retains no control over them in the execution of their work, since his implied permission to them to blast as they have been blasting is equiva-

lent to a direction to do so. — BRANNOCK v. ELMORE, Mo., 21 S. W. Rep. 451.

159. NEGOTIABLE INSTRUMENT. — Where a bank receives from one of its customers an unmatured note as collateral security for a loan from the bank, the facts that the bank has been in the habit of receiving notes from such customer as collateral, and that collections made on such collaterals were credited to the customer, who was sometimes permitted to check against such credits by giving other notes to replace those paid, do not show that the bank was not a *bona fide* holder of such note. — MAHASKA COUNTY STATE BANK v. CRIST, Iowa, 54 N. w. Rep. 450.

160. NEGOTIABLE INSTRUMENT — Accommodation Indorsers. — Accommodation indorsers, who have under their own control and management all the assets and business of their principal, and whose duty it is to see that funds are provided, and the debt paid, are not entitled to notice of the dishonor of his promissory note which they have indorsed. Thus the directors of an insolvent corporation who, wishing to raise funds to carry on the corporate business, procure a loan on a negotiable promissory note made by the corporation, payable to their order, on demand after date, at a bank, and indorsed by themselves individually, are liable as indorsers, without notice of the dishonor of the note by the corporation. — HULL v. MYERS, Ga., 16 S. E. Rep. 653.

161. NEGOTIABLE INSTRUMENT — Contribution. — The fact that plaintiff, one of four joint and several obligors on a note, agreed to and did hold harmless one of the others in order to induce him to sign the note, does not affect his right to contribution from the two other obligors, whether or not they knew of the existence of such agreement when they signed the note.—MURPHY v. GAGE, Tex., 21 S. W. Rep. 396.

162. NEGOTIABLE INSTRUMENT—Duress.—In an action against a decedent's estate on certain notes, where the defense was that they were given to prevent a prosecution of decedent's son for embezzlement, the will of decedent was not admissible, in behalf of defendant, when the only apparent object of its introduction was to show that decedent gave his son no share of his estate, which, as the will was executed several years before the transaction in controversy, might lead to the inference that the son was wayward, and troublesome to his parent. — WOLF v. TROXELL'S ESTATE, Mich., 54 N. W. Rep. 383.

163. NEGOTIABLE INSTRUMENTS — Interpretation. — A note provided for the payment of a certain sum, "subject to agreements dated * * *, interest payable semia-nnually." The agreements provided that, if payment was not made, the obligee should look only to the security of certain stock which had been transferred as collateral, and should not proceed against any other property whatsoever of the obligor: Held, that the semi-annual interest, as well as the principal, was controlled by the agreements, and could be collected only from the transferred stock. — REED v. CASSATT, Pa., 25 Atl. Rep. 1074.

164. OFFICERS — Constables. — At common law an officer was liable for the sufficiency of the sureties on a replevin bond; but under section 189 of the Code he is liable, after 24 hours, only where the defendant in replevin has excepted to the sufficiency of the sureties, and they, or new sureties have failed to justify.—THOMAS v. EDGERTON, Neb., 54 N. W. Rep. 426.

165. OLEOMARGARINE—Penalty for Sale.—In an action for the penalty imposed by Act May 21, 1885, §§ 1, 3, for the manufacture and sale of oleomargarine "as an article of food," mere proof of a sale will not authorize a recovery, in the absence of a showing that the article was intended to be used for food.—COMMONWEALTH v. SCHOLLENBERGER, Pa., 25 Atl. Rep. 999.

166. PARTNERSHIP—Assignment.—One partner cannot make a general assignment of the partnership effects for the benefit of creditors without the consent of the other partner, unless exceptional circumstances arise; and where the non-executing partner, though in another State at the time of the assignment, could easily have been reached by telegram or letter, no such circumstances exist as would warrant the execution of an assignment without his consent.—MAYER v. BERNSTEIN, Miss., 12 South. Rep. 257.

167. PARTNERSHIP NOTE—Validity.—Where a partner gives his individual note, secured by mortgage on his individual property, to raise funds for the partnership business, a note executed in the partnership name to such partner, and indorsed by him to the holder of the individual note, to procure an extension of time on that note, is valid in the hands of such holder as against the partnership, though given merely for the accommodation of such partner, without the knowledge of one of the members of the firm. — CHARLES T. HAYDEN MILLING CO. v. LEWIS, Ariz., 32 Pac. Rep. 263.

168. PARTNERSHIP — Retiring Partner. — A retiring partner in a banking firm, the business being continued by the other partners, who assume firm debts, occupies the position of a surety as to firm creditors existing at the time of his withdrawal; and the fact that a depositor leaves his deposit with the continuing partners, and accepts interest thereon, does not release the retiring partner from his liability as surety, since there is no contract on a sufficient consideration to extend the time of payment to a definite date.—CAMPBELL v. FLOYD, Pa., 25 Atl. Rep. 1033.

169. PARTNERSHIP DEBTS—Extinguishment. — Where one of two partners pays a debt of the firm with his own money, the effect of the payment is to extinguish the debt as a liability of the firm, so far as the creditors of the firm are concerned. The partner making the payment may ask for contribution from his copartner or credit against him, but he is not entitled to participate with the creditors of the firm in the distribution of its assets. — EDISON ELECTRIC ILLUMINATING CO. v. DE MOTT, N. J., 25 Atl. Rep. 952.

170. PLEADING—Equitable Defenses.—St. Mass. 1883, ch. 223, § 14, authorizing equitable defenses to be set up in actions at law, being limited to the superior courts, is not a general rule of practice in the State, and not binding upon the federal courts; and, moreover, its enactment shows that it is still the general law in Massachusetts that, ordinarily, defenses valid only in equity cannot be set up in common-law actions.—JOHNSON v. MERRY MOUNT GRANITE CO., U. S. C. C. (Mass.), 53 Fed. Rep. 570.

171. PLEADING—Misjoinder of Causes.—Where a single count of a complaint contains two causes of action, one in tort and the other in contract, and plaintiff is allowed, over defendant's objection, to introduce evidence to sustain both causes, the error is not cured by plaintiff's election, after the trial, to recover in contract only, when the judgment rendered does not limit plaintiff's recovery of costs to those incurred in the action in contract. — WIRTH v. BARTELL, Wis., 54 N. W. Rep. 399.

172. PLEADING COUNTERCLAIM. — In an action under section 5449, Comp. Laws, to determine adverse "estates and interests" in real estate, the defendant may by answer, in addition to a denial of plaintiff's title, all facts which show title in himself, and ask that such title be quieted and confirmed by the court. Such new matter, when properly pleaded, constitutes a counterclaim, within the meaning of subdivision 1, § 4915, Comp. Laws. Such counterclaim constitutes a cause of action in favor of the defendant, and against the plaintiff, which is "connected with the subject of the action. — POWER v. BOWDLE, N. Dak., 54 N. W. Rep. 404.

173. PROCESS—Service.—Where a person disappears from home, without any expression of an intention not to return, process left with his wife, nine days after his disappearance, at his usual place of abode, is a sufficient service to give the court jurisdiction.—BOTNA VAL. STATE BANK v. SILVER CITY BANK, Iowa, 54 N. W. Rep. 472.

174. PUBLIC LAND — County School Lands.—Although one who already has a homestead is not entitled, under Rev. St. art. 3939, to pre-empt another, no such limitation is placed on the prior right of purchase accorded to such person by Const. art. 7, § 6, with respect to county school lands on which he becomes an actual settler. — BAKER V. BURROUGHS, Tex., 21 S. W. Rep. 295.

175. PUBLIC LAND—County School Lands.—A married man, who is in possession of county school land at the time of its sale, and who has no land elsewhere, is an actual settler, so as to be entitled to prior right of purchase under article 7, § 6, of the constitution; and the fact that he had verbally agreed to transfer his right before a sale makes no difference. — BAKER V. MILLMAN, Tex., 21 S. W. Rep. 297.

176. RAILROAD COMPANIES—Contributory Negligence. — Plaintiff's intestate crossed a switch track used for unloading freight cars, at a point where 15 or 20 feet were usually left open between the cars for people to pass through. On his return, half an hour later, the cars had been moved so close together as to nearly block the crossing, and left only a small opening. While attempting to pass through such opening, he was caught and killed. It appeared that, had he looked around him before attempting to cross, he would have seen an engine on the track, with steam up, and that couplings of cars were being made: Held, a clear case of contributory negligence.—PANNELL V. NASHVILLE, F. & S. R. CO., Ala., 12 South. Rep. 236.

177. RAILROAD COMPANIES—Contributory Negligence. —In an action against a railroad company for the death of plaintiff's intestate at a city street crossing, where there were several tracks, there was evidence that the deceased, who was 25 years old, and possessed all his faculties, approached the crossing at a rapid walk, in broad daylight; that he had an unobstructed view for 1,000 feet in the direction defendant's train was approaching; that, as he reached the crossing, he looked, and walked for 30 feet in plain view of the approaching train, without slacking his speed, but did not look again before he was struck: Held, that he was guilty of contributory negligence.—GRAF V. CHICAGO & N. W. RY. CO., Mich., 54 N. W. Rep. 388.

178. RAILROAD COMPANIES—Contributory Negligence. —A traveler who steps upon a railroad track at a street crossing without looking for trains, and is killed by an engine, which he could have seen had he looked, is guilty of negligence which will preclude a recovery for his death.—TEXAS & N. O. RY. CO. V. BROWN, Tex., 21 S. W. Rep. 424.

179. RAILROAD COMPANIES—Crossing— Negligence.— It is the duty of a railway company to adopt well-tested inventions for the protection of persons lawfully on its track at highway crossings; and, if defendant's death was caused by ordinary negligence of the company in permitting the use of a hand car not supplied with the most efficient brakes the company is liable for his death, if such negligence was the proximate cause of his death, and he was not guilty of contributory negligence.— JOHNSON V. GULF, C. & S. F. RY. CO., Tex., 21 S. W. Rep. 274.

180. RAILROAD COMPANIES—Fires—Evidence.—It need not be proved that any particular engine was at fault, but it will be sufficient if it is proved that the fire was set by any engine passing over the defendant's railway; and the evidence may be wholly circumstantial,—as, first, that it was possible for fire to reach the plaintiff's property from the defendant's engines, and, second, facts tending to show that it probably originated from that cause, and no other.—UNION PAC. RY. CO. V. KELLER, Neb., 54 N. W. Rep. 420.

181. RAILROAD COMPANIES—Injuries to Stock.—Mansf. Dig. § 5537, provides that "all railroads operated in this State shall be responsible for all damages to persons and property done by the running of trains:" Held, in an action against a railroad company for killing a cow, that as the burden is on defendant to prove due care, and the proof shows that negligence could be imputed to it by the failure of either the fireman or engineer on a moving train to see the cow on the track in time to prevent its injury, the company did not exonerate itself by proving that the engineer had used due care.—LITTLE ROCK & M. R. CO. V. CHRISCOE, Ark., 21 S. W. Rep. 431.

182. RAILROAD COMPANIES—Negligence.—A railroad company is not liable for running over and killing a person lying asleep on its track, where its servants discovered him as soon as they could do so with reasonable care, and used all proper diligence to stop the train.—GREGORY V. SOUTHERN PAC. RY. CO., Tex., 21 S. W. Rep. 417.

183. RECEIVERS—Deposit of Trust Funds.—A receiver who deposits the money of the estate in his own bank to his individual credit, instead of to his credit as receiver, is guilty of a breach of duty, notwithstanding a parol direction to the clerks to be ready to pay over at any time when called upon.— SCHWARTZ V. KEYSTONE OIL CO., Pa., 25 Atl. Rep. 1018.

184. RES JUDICATA— Decision on Motion.— Plaintiff took a nonsuit in a State court after the hearing of the evidence and the giving of the instructions, and then within a year reinstituted the action in the same court. The cause was then removed, and in the federal court a motion was granted to stay further proceedings until plaintiff had satisfied the costs in the first proceeding: Held, that this order, though made on motion, was *res judicata* as to all questions involved therein, and plaintiff could not, after a regular term of court had intervened, maintain a motion to set the same aside, and proceed with the cause, except on showing compliance with its conditions.—BUCKLES V. CHICAGO, M. & ST. P. RY. CO., U. S. C. C. (Mo.), 53 Fed. Rep. 566.

185. SALE—Delivery.—The clerk of a provisional city government, under instructions from W, mayor of the city, and N, city attorney, ordered of plaintiff certain books, in the name of the city, the books being intended as payment for services rendered the city by N. Plaintiff shipped the books, consigning them to W, but charging them to the city. When the books reached W, although neither he nor N was then an officer of the city W directed a delivery of them to N, who received them, and sold them for value to defendant: Held, that as the sale was not completed, from the fact that there never was a delivery of them to the city, to whom they were sold, the title did not pass from plaintiff; the receipt of them by N being a wrongful conversion, by which he acqqired no title, and hence could give none. —QUINTON V. CUTLIP, Okla., 32 Pac. Rep. 269.

186. SALE—Estoppel.—Plaintiff wrote to defendants, who were commission merchants, that he had sold 198 head of cattle to B; that B had drawn on defendants for $1,000 as payment on them; that, on arrival of the cattle, defendants would find them in very good condition. Defendants paid the check, and the cattle were afterwards shipped to them: Held, that plaintiff was estopped by such letter from denying that the sale to B was an absolute sale, and that defendants were entitled to a lien on the cattle for the advance made, as soon as they came into their possession.— ELLSWORTH V. CAMPBELL, Iowa, 54 N. W. Rep. 477.

187. SALE—Stoppage *in* Transitu.—It is not essential to the enforcement of the seller's right of stoppage *in transitu* that the goods against which the right is sought to be enforced shall be found, and the seller may exercise that right though the property in question had been attached by a creditor of the buyer, and taken possession of by a third person, who claimed to have purchased them, on his giving a bond to produce them if the issue was decided against him.— DREYFUS V. MEYER, Miss., 12 South. Rep. 267.

188. SHERIFF'S BOND.—Where in an action against a sheriff, on his bond, for taking a claimant's bond with only one surety thereon, instead of two, as required by Rev. St. art. 4823, defendant alleges that the bond, on its acceptance by him, contained two sureties, and the evidence is in conflict as to this issue, the sub-

mission of it to the jury was proper, even though the bond, as produced at the trial, contained only one surety.—BERNHEIM v. SHANNON, Tex., 21 S. W. Rep. 386.

189. TAXATION—Exemption.—A vacant lot owned by a charitable institution, separated by a street from other lots, on which the buildings of the charity are situated, with nothing to show that such lot is necessary to the use of the charity, is not within Const. art. 9, § 1, which exempts from taxation "institutions of purely public charity."— CITY OF PHILADELPHIA v. LADIES' UNITED AID SOCIETY OF METHODIST EPISCOPAL CHURCH, Pa., 25 Atl. Rep. 1042.

190. TAX DEED—Validity—Fraud.—Where B has paid the taxes of H for several years, and then purchased at a tax sale, and after such purchase has written to H that he has paid the taxes on the land and taken the receipt as sold for taxes, but that it will be all right, and then gets a tax deed upon the certificate of sale, and does not inform H of that fact, and subsequently agrees to pay the taxes for H and then makes a contract with H for the purchase of the land, the tax deed is fraudulent and void as against H and those in privity with him.—GAMBLE v. HAMILTON, Fla., 12 South. Rep. 229.

191. TAX SALES—Redemption.— When a grantee in a sheriff's deed takes an assignment of a tax-sale certificate issued on a sale for taxes assessed against the land prior to the judgment on which the sheriff's sale is made, such assignment operates as a redemption from the tax sale, and a treasurer's deed will not defeat a mortgage executed prior to such judgment.—MANNING v. BONARD, Iowa, 54 N. W. Rep. 459.

192. TAX TITLES—Validity of Sale.—A purchaser at a tax sale must aver by pleading, and show by testimony, that the statutory steps necessary to a valid sale were taken, though he is the defendant in an action by the original owner for the recovery of the land, since he is always in a position to be reimbursed, and placed in *statu quo*, while the owner is liable to have his property sacrificed by irregular or fraudulent conduct of the officer or purchaser.—JONES v. MIRACLE, Ky., 21 S. W. Rep. 241.

193. TELEGRAPH COMPANIES — Negligence — Damages.—In an action against a telegraph company for delay in delivering a message to a mother to come to her sick son, by reason of which she did not reach him until after his death, is not improper to allege that the son frequently called for her, and asked that she be brought to him, since her mental anguish might be increased by the knowledge that he wished to see her, and could not.—WESTERN UNION TEL. CO. v. EVANS, Tex., 21 S. W. Rep. 266.

194. TELEGRAPH COMPANIES—Pleading.—In an action for damages for failure of defendant telegraph company to deliver promptly a telegram informing plaintiff of the serious illness of her mother, allegations that defendant's negligence prevented her from going to see her mother, and that, had the message been delivered promptly, she could have done so, are sufficient to show an intent and desire on her part to go, had she received the message promptly, though the complaint does not allege, in direct terms, that if the message had been promptly delivered she would have gone.—WESTERN UNION TEL. CO. v. ESKRIDGE, Ind., 33 N. E. Rep. 238.

195. TENANT IN COMMON—Trusts.—A tenant in common, who causes the common property to be sold for an incumbrance of less than one-sixth of its value, and then buys the title of the purchaser, holds such title in trust for himself and his cotenants.—HINTERS v. HINTERS, Mo., 21 S. W. Rep. 456.

196. TRADE-MARKS—Infringement. — Where there is no such similarity in the trade-marks used by plaintiffs and defendants, both firms being manufacturers of stove polish, as to justify the conclusion that one was intended as an imitation of the other, the fact that there is a resemblance in the size of the packages, and the manner of putting them up, both parties using tin foil as wrappers, over which is placed a paper wrapper of similar colors, so that perhaps a careless person might mistake one for the other if no examination was made, is not sufficient to justify the interference of a court of equity.—BROWN v. SEIDEL, Pa., 25 Atl. Rep. 1064.

197. TRESPASS TO LAND — Damages. — In action for damage to growing timber by fire, the measure of damages is the difference between the value of the timber standing and growing upon the land in question immediately before and immediately after the fire, with interest thereon from the date of the fire.—BURDICK v. CHICAGO, M. & ST. P. RY. CO., Iowa, 54 N. W. Rep. 439.

198. TRESPASS TO TRY TITLE—Conflict in Surveys.—In trespass to try title, seeking to cancel as a cloud on title that portion of a patent issued on a subsequent survey which conflicts with plaintiffs' survey, a certified copy of a map of the general land office, showing the several surveys, is admissible as evidence of the extent of the conflict.—HOUSTON & T. C. RY. CO. v. BOWIE'S HEIRS, Tex., 21 S. W. Rep. 804.

199. TRESPASS TO TRY TITLE—Defenses.—Where defendant in trespass to try title claims under a sheriff's deed executed prior to the time when the patent on the land sold on execution against plaintiff's ancestor was issued to him, such defendant should prove that at the time of the levy the land had been located, so as to show that defendant in execution had at the time a title subject to levy and sale; and in the absence of such proof, and of evidence authorizing a presumption that such location had been made, a holding that the land did not pass by the sheriff's deed is proper.—WATKINS v. HILL, Tex., 21 S. W. Rep. 374.

200. TRESPASS TO TRY TITLE—Evidence.—In trespass to try title, where defendants claim under sale of the premises by order of the probate court to pay a claim against the estate of a decedent, plaintiff will not be permitted to show that the estate against which such claim was allowed was not chargeable therewith.—LOONEY v. LINNEY, Tex., 21 S. W. Rep. 409.

201. TRESPASS TO TRY TITLE—Pleading and Proof.—In trespass to try title, a special answer, which alleges that defendant acquired title by purchase under an order of sale in partition proceedings, is sufficient to admit the instruments evidencing such title, without specially pleading them.—JOHNSON v. JAMES, Tex., 21 S. W. Rep. 372.

202. TRIAL—Gambling Verdict.—Where a jury agree that each member thereof shall mark the sum which he thinks the plaintiff is entitled to recover, on a slip of paper, and then ascertain by addition the amount of the sums so marked, and to then divide said amount by 12 (the number of jurors), and that the quotient resulting from such division shall be the amount of the verdict, such verdict is obtained by "resort to a determination of chance," within the meaning of that term, as used in subdivision 2, § 4430, Rev. St. 1887.—FLOOD v. MCCLURE, Idaho, 32 Pac. Rep. 254.

203. TRUST—Consideration—To raise an equity, in virtue of meritorious consideration, sufficient to induce the enforcement between volunteers of a gift or an incomplete trust not supported by valuable consideration, but which was fully intended, and partially carried into effect, by a deceased parent, in behalf of a child or children, the case must plainly appear to be within a single and well-defined purpose of the parent to execute the natural parental duty to support and maintain his child or children, which cannot be defeated without obvious injustice.—LANDON v. HUTTON, N. J., 25 Atl. Rep. 953.

204. TRUSTS — Tort of Cotrustee. — Defendant's cotrustee, while in the possession of a note to the trustees for a loan of the trust funds, became insolvent. Defendant, knowing this, and not wishing him to collect the debt, requested him to let it remain in the hands of the payors, and requested one of them not to pay the debt to his associate, but the associate collected and

misappropriated the amount: Held, that defendant's acts were not sufficient to relieve him of responsibility to the *cestui que trust* for the amount.—DARNABY V. WATTS, Ky., 21 S. W. Rep. 333.

205. TRUST DEED—Discharge.—R made a loan to F, who gave his note, and executed a trust deed to secure it. F having paid the note before maturity, R returned it and the trust deed to him. Ten days after, F asked R to assign the note to one B, who, having loaned money to F, was to take the note and trust deed as security. The trust deed provided that if the note made to R was paid when it was due, it was void, and the property therein conveyed was released: Held, that the trust deed was not revived.—BAILEY & ROCKAFELLOW, Ark., 22 S. W. Rep. 227.

206. USURY—Commissions to Broker.—Where it appears that a borrower's written application purported to make the broker his agent, and the services rendered by the broker in passing on the security offered, and in drawing the note and mortgage, though beneficial to the lender, were not all paid for by her, and were performed before the application for the loan was made to her, a plea of usury because of a commission charged by the broker will not be sustained, in the absence of testimony that the lender had been in the habit of making loans through the broker, or had money on deposit with him to be loaned, or other circumstances tending to affect the lender with knowledge that a commission was to be collected from the borrower in addition to the lawful interest.—HOLT V. KIRBY, Ark., 21 S. W. Rep. 432.

207. VENDOR AND PURCHASER—Contract.—A contract for the sale of a lot, one-half the price to be paid one year after a specified manufacturing company "shall have its main building under roof, and the balance in two years from that time," contained a condition avoiding the contract if the vendor should fail to cause the company "to transfer its works" from another city, and locate them in the addition in which the lot was situated: Held, that the contract does not depend for its validity on the condition that the factory shall be put in actual operation as a going concern, but only on the removal of the plant and the erection of the buildings specified.—SOUTH ST. JOSEPH LAND CO. V. PITT, Mo., 21 S. W. Rep. 449.

208. VENDOR AND VENDEE—Specific Performance.—A contract for the sale of land, one-fourth cash, balance on time, required a "complete abstract of title to be furnished, to be followed by warranty deed, conveying the grantor's title as shown by the abstract," and provided that, "should the title prove defective beyond remedy, then this contract to be void," and the earnest money to be refunded: Held, that the contract was not one for the future sale of the premises on condition that the vendor should furnish the vendee a satisfactory abstract of title, but a contract for the present sale of the land at and for the price therein stated, to be paid and secured in the manner therein provided, when the vendor should deliver a warranty deed conveying good title.—GREFFET V. WILLMAN, Mo., 21 S. W. Rep. 459.

209. WATERS — Irrigation.—Appropriators of waters for irrigation purposes, after conducting water to point of intended use, have a reasonable time in which to apply it to the use intended. They may add to the acreage of cultivated land from year to year, and make application of water thereto for irrigation as their necessities demand, or as their abilities may permit, until they have put to a beneficial use the entire amount of water first diverted by them; provided that that amount is needed for the reasonable irrigation of the land.—CONANT V. JONES, Idaho, 32 Pac. Rep. 250.

210. WATERS—Irrigation Companies—Stockholders.—Where a stockholder in a company organized for supplying water to land-owners has acquired a right to a certain amount of water, he may change the point of diversion of such water from one ranch to another, notwithstanding a long user on the former, unless the rights of others are injuriously affected, or unless his right to so divert it is restricted by some valid by-law of the company, or agreement; and a by-law impairing such a right would have no effect, unless authorized by the charter of the company, or assented to by the stockholder whose right is affected.—KNOWLES V. CLEAR CREEK, PLATTE RIVER & MILL DITCH CO., Colo., 32 Pac. Rep. 279.

211. WATERS—Riparian Rights—Alluvion.—The righ of the owner of land, whether rural or urban, on river shore to the increase thereof, caused by alluvia deposit, is settled in Missouri. Where a city lot i separated from the river by a street, owned in fee by the public, the accretion belongs to the street for public use, and not to the lot owner.—CITY OF ST. LOUIS V. MISSOURI PAC. RY. CO., Mo., 21 S. W. Rep. 202.

212. WATERS — Surface Water.—Where, from time immemorial, surface water had flowed through well-defined channels, from the adjacent country, upon plaintiff's land, and would still but for the erection by plaintiff of an embankment which diverted the water upon defendant's land, the fact that a change in the conformation of the adjoining country, resulting from its cultivation by strangers, had obliterated the natural channels, and formed new ones, which would cause the water to overflow defendants' lands but for an obstruction erected by strangers many years before such change, will not justify plaintiff in maintaining his embankment, to the injury of defendants.—DREW V. COLE, Cal., 32 Pac. Rep. 269.

213. WILLS — Bequest.—A bequest to the trustees of such free library as may be established within certain limits contemplates the creation of a new library in the future, and is not a bequest to an existing library.—IN RE PEPPER'S ESTATE, Penn., 25 Atl. Rep. 1058.

214. WILL—Charitable Bequest.—Testatrix provided that, as to the residue of her estate, "I direct my said executors, hereafter named, to distribute the same among such charitable institutions as they in their discretion deem proper:" Held, a valid bequest.—IN RE KINIKE'S ESTATE, Penn., 25 Atl. Rep. 1016.

215. WILLS—Construction.—Testator devised a parcel of his lands to his son J, "to be enjoyed by him, his heirs and assigns, forever, with free privilege to take what coal he wants for his own use or plantation off the home plantation." The lands devised and the "home plantation" were both underlain with coal, but the latter, only, had a mine in operation: Held, that the privilege of taking coal from the home plantation was personal to J, and did not descend to his heirs.—YOUGHIOGHENY RIVER COAL CO. V. PIERCE, Pa., 25 Atl. Rep. 1026.

216. WILLS— Construction. — Testator devised that portion of his premises on which a tannery was situated to his son John, and the portion having a mill on it to his son Joseph. The will provided that "John shall receive a deed free from all incumbrances. It is reserved that he is" to take water out of the mill race for running his tannery, for which he "shall tan yearly, for my son Joseph, one calfskin and one beaf hide," free of charge: Held, that the privileges reserved were personal to the legatees, and created no charge on the tannery tract.—MOSSER V. LESHER, Pa., 25 Atl. Rep. 1085.

217. WILL—Construction.—Where the first clause of a will devises an estate in fee, without words of limitation, and the other clauses burden the estate so devised with a trust in favor of testator's children, the devisee does not take a life estate, but the fee, subject to the trust imposed on the estate devised, and may convey her beneficial interest subject to such trust; How. St. § 5786, providing that any devise shall be construed to convey all the estate unless it shall clearly appear that there was an intention to convey a less estate.—FORBES V. DARLING, Mich., 54 N. W. Rep. 385.

218. WILLS—Estate Devised to Trustees.—A testator, by one clause of his will, devised certain property to A, subject to the provisions of another clause, appointing trustees to manage it, applying the income to

A's support, and making the trust a limitation on the title vested in A by the first clause until, in their discretion, A had become competent to manage it, when the title should vest absolutely in A: Held, that the absolute title to the property was vested in the trustees.—MEEK v. BRIGGS, Iowa, 54 N. W. Rep. 456.

219. WILLS—Executory Devise.—Where a will devises land in fee-simple, and then, in a subsequent clause, forbids the devisees to sell it, but empowers them to dispose of it by will, a limitation over in case of the death of either, intestate, without direct heirs, is not valid as an executory devise, since the essential element of such a devise is that it cannot be destroyed or defeated by any act of the first taker.—FISHER v. WISTER, Pa., 25 Atl. Rep. 1009.

220. WILLS—Legatees.—A gift of the income from the residue of an estate until it shall have amounted to a certain sum, to take effect immediately at the expiration of the lives in being at the testator's death, is not obnoxious to the rule forbidding perpetuities, however remotely it may end.—IN RE LENNIG'S ESTATE, Pa., 25 Atl. Rep. 1049.

221. WILLS—Nature of Estate.—Under a will directing that, when testator's youngest child came of age, the residue of his estate should be divided equally among his children, provided that, should any of them die before that time leaving children, they should take their parent's share, but, if they should die without leaving children, then their share should be divided among testator's remaining children, where one of testator's children dies before the time of distribution, leaving a child, which also dies before the time of distribution, the share goes to testator's surviving children.—IN RE CASCADEN'S ESTATE, Pa., 25 Atl. Rep. 1075.

222. WITNESSES—Transactions with Decedents.—The statutory provision that where one of the original parties to a cause of action is dead, and his personal representative is a party to the suit, the other party shall not be admitted to testify in his own favor, does not apply where the testimony of the decedent, taken at a former trial, has been preserved by bill of exceptions, even though such testimony is not first introduced by the personal representative.—STONE v. HUNT, Mo., 21 S. W. Rep. 454.

ABSTRACTS OF DECISIONS OF MISSOURI COURTS OF APPEAL.

ST. LOUIS COURT OF APPEALS.

ACCOUNT—Options.—In a suit upon an account, defense being made that the suit, out of which the account grew, was in violation of section 3931, R. S., which prevents the dealing in options, and was therefore void, it was held, that the intention of the buyer not to accept, or of the seller not to deliver the goods, must be a legal intention so as to bring the contract within the purview of the statute, that is, it must be either stated to the opposite contracting party, or knowledge of such intention on his part must be found by the jury by surrounding facts. Affirmed.—MULFORD v. CAESAR.

ATTACHMENT—Fraudulent Conveyances.—In an attachment suit, interplea being made by the vendee of the attachment debtor and being resisted on ground that the sale was concocted between vendor and vendee to hinder, delay and defraud creditors, it appearing that the interpleader had paid part of value and had assumed the debts of other creditors of vendee to the aggregate value of the remainder of the stock, those creditors consenting to the arrangement previous to the attachment, held, that the doctrine, that a purchaser from a fraudlent vendor, will only be protected to extent of payments made before notice of the fraud, can have no application. Affirmed.—TENNENT-STRIBLING SHOE CO. v. REEDY.

CONTRACT — Construction.—An instruction of trial court to jury, in a suit upon a contract, based upon an assumption of facts of which there was no evidence, held error, because the contract between the parties must be determined by what they said and did, and not by what they secretly contemplated. Reversed.—WILSON v. CROSNOE.

CONTRACT—Rights and Liabilities of Executor.—In a suit by a material man against an executrix and her codefendant association to recover a judgment against said executrix for the value of materials furnished, for the erection of a building belonging to her codefendant, under a contract between it and the testator, and to have said judgment declared a lien upon said property, held, that contract between deceased and association did not terminate at his death, but that contract survived and was enforceable for or against the executor. Affirmed.—BAMBRICK v. CHURCH ASS'N.

CORPORATIONS — Contracts — Ultra Vires.—Where a contract between a corporation and a contractor has been fully executed on the part of the corporation, the sureties on the contractors bond, in a suit on the bond, cannot escape liability on the plea of *ultra vires* though the statute under which the corporation was organized confers no authority upon it to enter into the contract, but does not expressly prohibit the same. Affirmed.—ASHENBRODEL CLUB v. FINLAY.

DAMAGES—Cities—Changes of Street Grades.—Where an owner sues a city to recover for damages to his property caused by a change in the street grades adjoining said property, held, error to allow plaintiff to prove, as damages in this case, the decrease in market value by reason of subsequent flooding of premises by undue accumulation of surface water. As cause of overflow is of a temporary character the plaintiff's measure of damages in this branch is the actual damage sustained at the date of the institution of the action. Reversed.—CARSON v. CITY OF SPRINGFIELD.

EQUITY—Jurisdiction—Fraud.—In a suit in equity to set aside an allowance by the probate court, of a claim against an estate on the ground that allowance was fraudulent and without foundation in law and fact, the estate consisting of personalty and realty; held, that as plaintiffs have no remedy at law to prevent defendant's compelling administrator to apply the personalty in discharge of their claim, there is ground for equitable interference. Reversed.—RAMSEY v. HICKS.

EVIDENCE—Rebuttal.—In an action to recover damages for slander, defendant offered testimony to show that part of plaintiff's witnesses were suborned, whereupon court allowed plaintiff in rebuttal to call witnesses in support of his own moral character and veracity; held, that plaintiff could contradict this evidence in rebuttal, but that the introduction of evidence as to his moral character and veracity, to fortify this contradiction, was prejudicial error. Reversed.—FULKERSON v. MURDOCK.

EVIDENCE—Verdict Unsupported by.—When upon a full examination of all the evidence it clearly appears that the jury found a certain fact, and having so found, they ought under the conceded facts, to have found for defendant but found for plaintiff, the appellate court will reverse the verdict as unsuppported by the evidence. Reversed.—HOLT v. MORTON.

EXEMPTIONS — Personalty held Jointly by Husband and Wife.—In a suit on a constable's bond for the failure of the constable to return money taken on execution, in which the execution debtor claims exemptions, it was held, that the husband is entitled to only half of money deposited in bank in joint names of husband and wife, which he can claim as exempt if it does not exceed the amount of his exemptions, and the wife is entitled to balance. Affirmed.—TOEBBEN v. BRADY.